Committee on Courts

Wednesday March 7, 2007
9:00 a.m.—11:00 a.m.
306 HOB

Meeting Packet

Marco Rubio
Speaker

Mark Mahon
Chair

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 47 Student Loans
SPONSOR(S): Porth and Kravitz
TIED BILLS: None **IDEN./SIM. BILLS:** SB 196

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Courts		Larson LAL	Bond MB
2) Safety & Security Council			
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

This bill creates a student loan repayment assistance program for eligible assistant state attorneys, assistant public defenders, assistant attorneys general, and assistant statewide prosecutors.

Eligible attorneys who have completed between 3-5 years of continuous service are eligible to receive up to $3,000 annually in student loan repayment, while eligible attorneys who have completed 6-12 years of continuous service are eligible to receive up to $5,000 annually in student loan repayment. Eligibility ceases after 12 years of service, repayment of $44,000 in loans, or upon full payment of student loans.

The bill contains no specific appropriation to fund the program. Funding, if appropriated, would be provided by the Legislature through an annual appropriation of an unspecified amount. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill creates a new government program.

B. EFFECT OF PROPOSED CHANGES:

Background

Currently, an assistant state attorney or an assistant public defender earns a minimum starting salary of $39,083.52.[1] Assistant attorney generals and assistant statewide prosecutors earn an average salary of $44,727.08 with 0-2 years of experience.[2]

Loan Repayment Assistance Programs (LRAPs) aid college graduates, who take lower paying government sector or public service jobs, to repay their student loans. The American Bar Association encourages the establishment of LRAPs to assist law school graduates in their repayment of these debts and to encourage public service.[3] Many graduates from law schools have accumulated educational debt in excess of $80,000 for their undergraduate and law school degrees.[4]

Effect of the Bill

The bill creates a student loan assistance program for eligible career attorneys to provide financial assistance in repayment of student loans. Those attorneys that have completed at least 3-12 years of continuous service are eligible for loan repayment assistance. Eligible attorneys with 3-5 years of continuous service may receive up to $3,000 annually in loan repayment assistance while those with 6-12 years of continuous service may receive $5,000 annually.[5] A break in employment of more than 2 weeks may constitute a break in continuous service and make the attorney ineligible.

The bill provides that within 30 days after the employment anniversary date of an eligible attorney, the attorney may submit to his or her employer an affidavit that certifies that he or she is an eligible attorney with one or more eligible student loans. The bill defines the term "eligible student loan" as a loan that was issued pursuant to the Higher Education Act of 1965, as amended, to an eligible career attorney to fund his or her law school education and which is not in default.

Upon approval by the employing office, the certification affidavit must be submitted to the administering body -- the Justice Administrative Commission (JAC) for assistant state attorneys or assistant public defenders or the Office of the Attorney General for assistant attorney generals or assistant statewide prosecutors -- within 60 days of the last employment anniversary date. The administering body will make a payment to the lender that services the eligible student loan between July 1 and July 31 of the fiscal year following receipt of the certification. If more than one eligible student loan exists, the administering body will pay the loan with the highest interest rate.

The bill provides a pro rata formula to be used in the event that the appropriation is less than the amount necessary to completely fund the program. Payments of eligible student loans must cease upon totaling $44,000 per eligible career attorney or upon full satisfaction of the loan, whichever occurs first.

This bill does not have a dedicated funding source or a required annual payment; thus it is dependent upon annual appropriation.

C. SECTION DIRECTORY:

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[1]Source: Justice Administrative Commission, February 2007
[2]Source: Office of the Attorney General, February 2007
[3]See http://www.abanet.org/legalservices/sclaid/lrap/downloads/finallawschoollrapbrochure.pdf
[4] See http://www.abanet.org/legalservices/sclaid/lrap/downloads/lrapfinalreport.pdf
[5] The bill defines the term eligible attorney as an assistant state attorney, assistant public defender, assistant attorney general or assistant statewide prosecutor.

Section 1 creates s. 43.45, F.S., regarding a loan repayment program.

Section 2 provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   There is no specific appropriation funded in the bill. Should the Legislature fund the program, the JAC estimates that 803 assistant state attorneys and assistant public defenders would use the loan repayment assistance program. This estimate assumes that 75 percent of the attorneys with between 3 and 5 years of experience have student loans to repay. The JAC also estimates that 50 percent of attorneys with between 6 and 12 years of experience have student loans to repay. In accordance with the figures above, the JAC estimates that the cost of student loan repayment assistance authorized by the bill for attorneys employed by the office of a state attorney and the office of a public defender is $2,957,000 for the first year.[6]

   The Office of the Attorney General estimates that 88 assistant attorney generals and assistant statewide prosecutors would use the loan repayment program. This estimate assumes that there are 80 percent of attorneys in the 3 to 5 year bracket and 50 percent of the attorneys in the 6 to 12 year bracket. The Office of the Attorney General estimates that the cost of implementing the program for the first year would be approximately $372,000.[7]

   Additionally, according to the JAC, one full-time employee is required to administer the program at a cost of $63,898 in recurring general revenue and $4,561 in non-recurring general revenue.

Below is a recap of the estimated cost to fund the Student Loan Repayment Assistance Program for 3 years, if fully funded.

	Fiscal Year			
	2007-2008	2008-2009	2009-2010	Total
Recurring:				
Justice Administration Commission - Loan repayments	2,957,000	2,957,000	2,957,000	8,871,000
Office of the Attorney General - Loan repayments	372,000	372,000	372,000	1,116,000
JAC (includes salaries & benefits, expenses, etc)	63,898	63,898	63,898	191,694
Non-recurring				
JAC	4,561			4,561
Total	3,397,459	3,392,898	3,392,898	10,183,255

[6] Source: Justice Administrative Commission February 2007

[7] Source: Office of the Attorney General, February 2007

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Subject to specific appropriations, this bill provides for the repayment of student loans for certain state employees.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The JAC and the Office of the Attorney General are granted rule-making authority to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Although the bill is an attempt to assist students in repayment of student loans, the financial assistance would likely constitute taxable income to the attorney.[8]

The bill provides that a break in continuous service of more than 2 weeks would make an eligible attorney ineligible for student loan repayment assistance. The bill does not specifically address extended family or medical leave. The state cannot deny a career service employee the use of and payment for annual leave credits for parental or family medical leave.[9]

The Family Medical Leave Act (FMLA)[10] provides that an eligible employee may take up to 12 work weeks of leave during any 12 month period for any of the following reasons:

1) The birth of a son or daughter of the employee and in order to care for such son or daughter;

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[8] For example, if a recipient of the financial assistance receives a $3,000 payment, that money would be subject to 25% federal withholding taxes and 7.65% for combined Medicaid and social security taxes lowering the payment to approximately $2020.50. See s.110.221, F.S.

[9] See s.110.221, F.S.

[10] Family Medical Leave Act, 29 U.S.C. s.2612 (2006)

2) The placement of a son or daughter with the employee for adoption or foster care;

3) In order to care for a spouse, or son, daughter, or parent of the employee, if such spouse, son, daughter or parent has a serious health condition; or

4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's position.

It is unclear whether a break in service under FMLA would create a break in service making a person ineligible under this program.

D. STATEMENT OF THE SPONSOR:

The sponsor is working on an amendment that will eliminate the fiscal impact upon the state, and give authority to local state attorneys and public defenders to encourage their best employees to stay with loan assistance from their local budget.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to student loans; creating s. 43.45, F.S.; providing for a financial assistance program administered by the Justice Administrative Commission and the Office of the Attorney General to assist a career assistant state attorney, assistant public defender, assistant attorney general, or assistant statewide prosecutor in the repayment of eligible student loans; providing definitions; providing elements of the program; requiring the administering body to make a payment of a certain amount; providing for funding; requiring rulemaking; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 43.45, Florida Statutes, is created to read:

43.45 Student loan assistance program; administration.--

(1) The administering body shall implement a student loan assistance program for eligible career attorneys. The purpose of the program is to provide financial assistance to eligible career attorneys for the repayment of eligible student loans.

(2) As used in this section, the term:

(a) "Administering body" means the Justice Administrative Commission when the eligible career attorney is employed as an assistant state attorney or assistant public defender or the Office of the Attorney General when the eligible career attorney is employed as an assistant attorney general or assistant

statewide prosecutor.

(b) "Eligible attorney" means an assistant state attorney, assistant public defender, assistant attorney general, or assistant statewide prosecutor.

(c) "Eligible career attorney" means an eligible attorney who has completed at least 3 years but not more than 12 years of continuous service on his or her employment anniversary date. However, eligibility for student loan repayment assistance may not be lost due to a break in employment of less than 2 weeks while an eligible attorney transfers to another employer of eligible attorneys.

(d) "Eligible student loan" means a loan that was issued pursuant to the Higher Education Act of 1965, as amended, to an eligible career attorney to fund his or her law school education and which is not in default.

(e) "Maximum available amount" means, in the event that the amount of an appropriation from the General Revenue Fund to an administering body is less than the amount necessary to fund total payments by the administering body, the amount that results from multiplying the percentage of total funding appropriated by the payment amount of $3,000 or $5,000 as provided in paragraph (3)(b). The percentage of total funding appropriated is the amount that results from dividing the amount of the appropriation by the amount necessary to fund total payments under paragraph (3)(b).

(3) The student loan assistance program shall be administered in the following manner:

(a) Within 30 days after the employment anniversary date

of an individual, the individual may submit to his or her employer a certification affidavit on a form authorized by the administering body, which certifies that he or she, as of his or her last employment anniversary date, is an eligible career attorney with one or more eligible student loans. Upon approval by the employing state attorney, public defender, Attorney General, or statewide prosecutor, the certification affidavit shall be submitted to the administering body within 60 days following the last employment anniversary date of the eligible career attorney.

(b) The administering body that receives a certification affidavit for an eligible career attorney having:

1. Three to five years of continuous service shall make a payment in the amount of $3,000 or in the maximum available amount, whichever is less.

2. Six to twelve years of continuous service shall make a payment in the amount of $5,000 or in the maximum available amount, whichever is less.

(c) A payment under paragraph (b) shall be made by the administering body:

1. For the benefit of the eligible career attorney named in the certification affidavit and for the purpose of satisfying his or her eligible student loan obligation.

2. To the lender that services the eligible student loan between July 1 and July 31 of the next fiscal year following receipt of the certification affidavit by the administering body.

3. For the eligible student loan that has the highest

current interest rate if the eligible career attorney holds more than one eligible student loan.

(d) Payments under paragraph (b) shall cease upon totaling $44,000 per eligible career attorney or upon full satisfaction of the eligible student loan, whichever occurs first.

(4) The student loan assistance program shall be funded annually by an appropriation from the General Revenue Fund to the administering body.

(5) The administering body shall adopt rules to administer this section.

Section 2. This act shall take effect July 1, 2007.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

Bill No. **HB 47**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Committee on Courts

Representative(s) Porth offered the following:

Amendment (with title amendments)

Remove line(s) 90-92 and insert:

(4) The student loan assistance program may be funded annually contingent upon a specific appropriation for student loan repayment assistance to eligible assistant state attorneys, assistant public defenders, assistant attorney generals, and assistant statewide prosecutors specifically identified in the General Appropriations Act.

========== T I T L E A M E N D M E N T ==========

Remove line(s) 11 and insert:

amount; providing for contingent funding; requiring rulemaking;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 179 Practice of Law
SPONSOR(S): Needelman
TIED BILLS: None **IDEN./SIM. BILLS:** SB 174

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Courts		Bond	Bond
2) Safety & Security Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

Current law prohibits the elected sheriff or clerk of the court from practicing law. The same law also prohibits deputy sheriffs and deputy clerks from practicing law.

This bill provides that only full-time deputy sheriffs and full-time deputy clerks are prohibited from practicing law.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Section 454.18, F.S., prohibits the following persons from practicing law:

- Sheriff
- Any deputy sheriff
- Clerk of the Court
- Any Deputy Clerk of the Court.

The law was enacted in 1925. It is unclear why this prohibition was enacted.

The current effect of the bill is felt primarily by reserve contingents of the Sheriff's offices, where practicing attorneys have been prohibited from joining the reserves because of the statute.

This bill amends s. 454.18, F.S., to limit the restriction related to deputy sheriffs and deputy clerks to full-time employees. Thus, this bill has the effect of allowing attorneys to work as part-time deputy sheriffs or part-time deputy clerks.

C. SECTION DIRECTORY:

Section 1 amends s. 454.18, F.S., regarding the practice of law.

Section 2 provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill does not change the traditional duty that elected sheriffs or elected clerks have to the public. Although allowed by this bill, sheriffs and clerks should not employ a part-time deputy whose duties as a practicing attorney would cause a conflict of interest with the duties to the public as a deputy sheriff or deputy clerk.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to the practice of law; amending s. 454.18, F.S.; permitting deputy clerks of court and deputy sheriffs who are employed less than full time to practice law; making editorial changes; conforming an exception; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 454.18, Florida Statutes, is amended to read:

454.18 Officers not allowed to practice.--No sheriff or clerk of any court, or full-time deputy thereof, shall practice in this state, nor shall any person not of good moral character, or who has been convicted of an infamous crime be entitled to practice. ~~But~~ No person shall be denied the right to practice on account of sex, race, or color. ~~And~~ Any person, whether an attorney or not, or whether within the exceptions mentioned above or not, may conduct his or her own cause in any court of this state, or before any public board, committee, or officer, subject to the lawful rules and discipline of such court, board, committee, or officer. The provisions of this section restricting the practice of law by a sheriff or clerk, or full-time deputy thereof, shall not apply in a case where such person is representing the office or agency in the course of his or her duties as an attorney.

Section 2. This act shall take effect July 1, 2007.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 253 Paternity Actions
SPONSOR(S): Richardson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1682

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Courts		Blalock	Bond
2) Safety & Security Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

The term "service of process" refers to the stage of a legal proceeding where a party is notified that they have been named as a party to the proceeding, and that they need to take some action to protect their legal rights. In general, service of process must be accomplished by personal delivery of the papers to the person; although in certain instances service of process may be accomplished by publication of notice in a legal advertisement.

This bill provides that notice may be served by publication in any action or proceeding for the determination of paternity, but only as to the legal father in a paternity action in which another man is alleged to be the child's biological father.

This bill may have a minimal negative fiscal impact on state government to the extent that the Department of Revenue chooses to serve process by publication instead of through the authorized county sheriff. This bill appears to have a potential minimal negative fiscal impact on county revenues and expenditures.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Service of process is the formal delivery of a writ, summons, or other legal process or notice. Statutes governing service of process are strictly construed to insure that defendants receive notice of an action against them and have the opportunity to protect their rights.

Personal service is the primary method of obtaining jurisdiction over the person of the defendant, and is the most effective method of giving notice to the defendant that a suit has been commenced against him or her.[1] Service of original process is made by delivering a copy of the process to the person to be served with a copy of the complaint, petition, or other initial pleading or paper.[2]

In designated types of cases, service of process by publication is authorized in place of personal service on a party.[3] Service of process by publication is generally the service of process on an absent or unknown defendant by publishing a notice in a newspaper or other public medium. The purpose of providing service of process by publication is to give an unknown, absent, or concealed defendant an opportunity to come into court and defend the suit against him or her within the time specified in the order to appear.[4] Statutes allowing service by publication must provide for sufficient notice of the action to be fair to the defendants and to satisfy the due process requirements of the state and federal constitutions.[5]

Section 49.031, F.S., provides that in order to serve process by publication, the plaintiff must file a sworn statement containing certain information. Section 49.041, F.S., provides that the sworn statement must include a provision stating that a diligent search and inquiry has been made to discover the name and residence of the person being served by publication.

Section 49.011, F.S., provides that service of process by publication may be had in any action or proceeding:

- To enforce a legal or equitable lien on or claim to a title or interest in real or personal property within the jurisdiction of the court or a fund held or debt owed by a party on whom process can be served in Florida;
- To quiet title or remove an encumbrance, lien, or cloud on the title to any real or personal property within the jurisdiction of the court or a fund held or debt owed by any party on whom process can be served in Florida;
- To partition real or personal property within the jurisdiction of the court;
- For the dissolution or annulment of a marriage;
- For the construction of a will, deed, contract, or other written instrument, and for a judicial declaration or enforcement of a legal or equitable right, title, claim, lien, or interest thereunder;

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[1] *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225 (Fla. 1986).
[2] Section 48.031(1)(a), F.S.
[3] Section 49.011, F.S.
[4] *Seiton v. Miami Roofing & Sheet Metal*, 10 So. 2d 428 (1942)
[5] *Gribbel v. Henderson*, 151 Fla. 712, 10 So. 2d 734 (1942)

- To reestablish lost instruments or records that have or should have their situs within the jurisdiction of the court;
- In which there is issued and executed a writ of replevin, garnishment, or attachment;
- In which any other writ or process is issued and executed that places any property, fund, or debt in the custody of the court;
- To revive a judgment by motion or scire facias;
- For adoption;
- In which personal service of process or notice is not required by the statutes or constitution of Florida or the Constitution of the United States;
- In probate or guardianship proceedings where personal service of process or notice is not required by the statutes or the constitution of Florida or the Constitution of the United States;
- For termination of parental rights pursuant to part IX of chapter 39; and
- For temporary custody of a minor child.[6]

Service of process by publication in other types of action is improper.[7] Therefore, service of process by publication is not currently allowed in any action to determine paternity proceedings because it is not expressly provided for in statute.

The Department of Revenue has been granted the authority to help obtain and enforce court ordered child support obligations. In many cases the Department of Revenue must file a petition with the court to establish paternity before the department can request the court to order child support payments. When a child is born to a married woman, there is a legal presumption that the child's "legal father" is the mother's husband. The "legal father" is also presumed to be the person whose name is on the child's birth certificate. In certain situations, a person may sign the birth certificate even though they may not know for sure whether they are the biological father. When a dispute arises as to who the actual "biological father" of a child is, for purposes of establishing child support, a determination of paternity action is filed to determine the biological father.

In a judicial action to determine paternity and obtain a child support order against an alleged biological father, where another person has already been designated the legal father, the current legal father must be made a party to the action.[8] As a necessary party, the legal father must be served notice before a final judgment of paternity and support order can be obtained. In many cases, the legal father cannot be located and therefore cannot be personally served with legal process. Since service of process cannot be made by publication in a paternity action, these paternity and support cases cannot be resolved.

Section 742.09, F.S., provides that it is a first-degree misdemeanor for any owner, publisher, or operator of any newspaper, magazine, or other publication of any kind, or any broadcaster, to publish the name of any party in a determination of parentage action or proceeding.

Effect of Bill

This bill amends s. 49.011, F.S., to add determination of paternity to the list of actions or proceedings where service of process by publication is allowed. However, the bill limits service of process by publication in a paternity action to only the legal father in a paternity action in which another man is alleged to be the child's biological father.

This bill creates s. 409.257(2), F.S., to provide that the Department of Revenue may serve process upon a legal father by publication in any action or proceeding to determine paternity. Before service may be made by publication on a legal father in a paternity action, however, there must first be a diligent search and inquiry concerning the location of the legal father as required in s. 49.041, F.S. The

[6] Section 49.011, F.S.
[7] *Honegger v. Coastal Fertilizer & Supply, Inc.*, 712 So. 2d 1161 (Fla. 2nd DCA 1998)
[8] *Department of Revenue v. Cummings et al*, 930 So. 2d 604 (Fla. 2006)

Department of Revenue is required to follow the regulations for service by publication provided in ch. 49, F.S.

This bill amends the criminal offense at s. 742.09, F.S., to provide that it will not be a first-degree misdemeanor for a newspaper, magazine or other publication to publish the name of any party in a paternity action or proceeding when it is for the purpose of serving process by publication in a determination of paternity action or proceeding.

C. SECTION DIRECTORY:

Section 1 amends s. 49.011, F.S., relating to service of process by publication.

Section 2 amends s. 409.257, F.S., relating to service of process by the Department of Revenue regarding court ordered support obligations.

Section 3 amends s. 742.09, F.S., relating to the publishing of names of people involved in a determination of parentage proceeding.

Section 4 provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

If the Department of Revenue chooses to use the publication method of serving process in a paternity proceeding, as provided by this bill, then the Department will have to pay the costs that are charged by the newspaper or magazine to print such legal notice.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill appears that it could have a negative impact on county workload and revenues by allowing notice to be served through publication in newspaper instead of by the sheriff. The sheriff would normally receive a fee for carrying out a personal service of process in a paternity action or proceeding, and under this bill a person could serve notice through publication and avoid the fee, which would normally be charged by the sheriff.

2. Expenditures:

This bill appears to reduce county expenditures by possibly reducing the number of process notices that a sheriff might otherwise be required to serve. In some counties the cost of serving process is greater than the fee collected, so this bill could reduce expenditures if less people served notice by publication in a paternity action.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

N/A

A bill to be entitled

An act relating to paternity actions; amending s. 49.011, F.S.; providing for service of process by publication in certain paternity actions; amending s. 409.257, F.S.; permitting service of process and orders by publication upon legal fathers in paternity actions if specified requirements are met; amending s. 742.09, F.S.; providing an exception to a ban on publishing names in paternity proceedings for service by publication; updating terminology; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (15) is added to section 49.011, Florida Statutes, to read:

49.011 Service of process by publication; cases in which allowed.--Service of process by publication may be made in any court on any person mentioned in s. 49.021 in any action or proceeding:

(15) To determine paternity, but only as to the legal father in a paternity action in which another man is alleged to be the child's biological father.

Section 2. Section 409.257, Florida Statutes, is amended to read:

409.257 Service of process.--

(1)(a) The service of initial process and orders in lawsuits filed by the department~~,~~ under ss. 409.2551-409.2598 ~~this act,~~ shall be served by the sheriff in the county where the

person to be served may be found or, if determined more effective by the department, by any means permitted under chapter 48 for service of process in a civil action. The sheriff shall be reimbursed at the prevailing rate of federal financial participation for service of process and orders as allowed by law. The sheriff shall bill the department monthly as provided for in s. 30.51(2).

(b) ~~In addition,~~ Process and orders may also be served or executed by authorized agents of the department at the department's discretion, ~~,~~ provided that the agent of the department does not take any action against personal property, real property, or persons.

(2) The department may serve process and orders upon a legal father by publication as provided in chapter 49 in any action or proceeding to determine paternity, provided that a diligent search and inquiry concerning the legal father has been made as required by s. 49.041.

(3) Notices and other intermediate process, except witness subpoenas, shall be served by the department as provided for in the Florida Rules of Civil Procedure.

(4) Witness subpoenas shall be served by the department by United States mail as provided for in s. 48.031(3).

Section 3. Section 742.09, Florida Statutes, is amended to read:

742.09 Publishing names; penalty.--Except for service of process by publication under chapter 49, it shall be unlawful for the owner, publisher, manager, or operator of any newspaper, magazine, broadcast outlet ~~radio station~~, or other publication

of any kind whatsoever, or any other person responsible therefor, or any ~~radio~~ broadcaster, to publish the name of any of the parties to any court proceeding instituted or prosecuted under this chapter ~~act~~; and any person violating this provision commits ~~shall be guilty of~~ a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 4. This act shall take effect July 1, 2007.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 405 Vacation and Timeshare Plans
SPONSOR(S): Mealor
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Courts		Blalock AFB	Bond MB
2) Safety & Security Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Florida Vacation Plan and Timesharing Act establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers and prospective purchasers. Authority to implement these regulations has been granted to the Division of Florida Land Sales, Condominiums, and Mobile Homes within the Department of Business and Professional Regulation. This bill makes the following changes to the Florida Vacation Plan and Timesharing Act:

- Amends the formula for funding reserve accounts for capital expenditures and deferred maintenance relating to condominium conversions;
- Amends the purchaser to accommodation ratio from a "one-to-one purchaser to accommodation ratio" to a "one-to-one use right to use night requirement ratio";
- Allows a seller to offer an out-of-state timeshare interest in a timeshare plan without filing a public offering statement under certain circumstances;
- Increases security and protection of personal information of timeshare owners;
- Deletes the provisions requiring a public offering statement to include a description of developer financing;
- Creates recordkeeping requirements for resale service providers and lead dealers;
- Amends the insurance requirements of the managing entity and deletes the requirement that the amount of insurance coverage be equal to the replacement cost of the accommodations and facilities;
- Exempts the managing entity from liability for claims relating to insufficient or inadequate insurance based on gross negligence or willful misconduct, or if the insurance plan was approved by a majority of the owners of the timeshare plan; and
- Provides that the Governor may appoint commissioners of deeds to take acknowledgments, proofs of executions, or oaths in international waters.

This bill appears to have a negative recurring fiscal impact on state revenues of approximately $118,000, and an unknown but likely minimal negative recurring impact on expenditures, both affecting the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill decreases government regulation of timeshare plans located outside the state of Florida.

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

The Florida Vacation Plan and Timesharing Act establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers and prospective purchasers.[1] A timeshare unit is an accommodation of a timeshare plan which is divided into timeshare periods[2] or a condominium unit in which timeshare estates have been created.[3] A timeshare plan is any arrangement, plan, scheme, or similar device whereby a purchaser gives consideration for ownership rights in, or a right to use, any accommodations and facilities for less than a full year during any given year, but not necessarily for consecutive years. Prior to offering any timeshare plan, a developer must file a registered public offering statement with the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation for approval.[4]

EFFECT OF BILL

Formula for Funding Reserve Accounts

Present Situation

A timeshare plan that is subject to ch. 718, F.S. (condominium act) and ch. 719, F.S. (cooperative act) is exempt from Part VI of chapter 718 and part VI of chapter 719, relating to conversion of existing improvements to the condominium or cooperative form of ownership, provided that a developer converting existing improvements, such as the plumbing, the roof and the air-conditioner, to a timeshare condominium or timeshare cooperative comply with certain requirements.[5] Where the existing improvements received a certificate of occupancy more than 18 months before such conversion, a developer must either:

1. Renovate and improve the accommodations to meet certain standards; or

2. Fund reserve accounts for capital expenditures and deferred maintenance for the roof, plumbing, air-conditioning, and any component of the structure the useful life of which is less than the useful life of the overall structure. The amount that a developer must fund a reserve account is determined using the following formula:

> "the product of the estimated current replacement cost of the component as of the date of conversion multiplied by a fraction with the numerator being the remaining life of the component in years and

[1] Sections 721.02(2), (3), F.S.
[2] Section 721.05(39), F.S.
[3] Section 718.103(26), F.S.
[4] Section 721.07, F.S.
[5] Section 721.03(3), F.S.

the denominator being the total useful life of the component in years (a x b/c = x)[6]."[7]

Alternatively, the reserve accounts may be funded for each component in an amount equal to the amount that would be required to be maintained pursuant to the funding of converter reserve accounts provided for in s. 718.618(1), F.S. or s. 719.618(1), F.S.

Proposed Changes

This bill amends s. 721.03(3), F.S. by revising the formula used to determine the amount required to be placed in the converter reserve account described above. This bill changes the numerator of the fraction used in the funding formula from "the remaining life of the component in years" to "the age of the component in years". This change in the formula will require the developer, at the time of conversion, to put less money in the reserve accounts if the component is older. However, if the component is not very old then the amount put in the reserve account will be greater than current law. Under the current formula the older the component is at conversion the greater the amount that the developer is required to put in the reserve fund, and the lower the age of the component at conversion the lesser the amount that has to be put in the reserve account.

Limit on the Number of Timeshare Interests a Developer Can Offer

Present Situation

Section 721.03(10), F.S., provides that a developer or seller may not offer timeshare units if it would cause the total number of timeshare interests offered to exceed a one-to-one purchaser to accommodation ratio. The purpose of this provision is to ensure that timeshare projects are not oversold.

Proposed Changes

This bill amends s. 721.03(10), F.S., to provide that a developer or seller may not offer timeshare units if it would cause the total number of timeshare interests offered to exceed a one-to-one "use right" to "use night requirement" ratio.

This bill defines the one-to-one use right to use night requirement ratio as "the sum of the nights that owners are entitled to use in a given 12-month period shall not exceed the number of nights available for use by those owners during the same 12-month period". No individual timeshare unit may be counted as providing more than 365 use nights per 12-month period or more than 366 use nights per 12-month period that includes February 29. The use rights of each owner shall be counted without regard to whether the owner's use rights have been suspended for failure to pay assessments or otherwise.

Selling Out-of State Timeshare Plans Without Filing a Public Offering Statement

Present Situation

Under current law, a person cannot sell a timeshare or provide information to a prospective purchaser about a timeshare unit that is located outside the state of Florida, unless the timeshare plan has been filed and approved by the division. While a person is staying at a timeshare located inside the state of

[6] a = replacement cost of component, b = remaining life of component, c = total life of component, x = required funding of reserve account.
[7] Section 721.03(3)(e), F.S.

Florida the developer of the timeshare may want to provide the person with information about another timeshare for sale by that developer, including ones located out of the state.

Proposed Changes

This bill creates s. 721.03(11), F.S., to allow a seller to offer timeshare interests in a real property timeshare plan located outside the state of Florida without filing a public offering statement, provided all of the following criteria have been satisfied:

1. The seller must provide a disclosure statement to each prospective purchaser of an out-of-state timeshare. The disclosure statements for single-site and multi-site timeshare plans must contain information and exhibits that are substantially equivalent to the disclosures required for timeshare and multi-state timeshare public offering statements under current law.[8]

2. The seller must give each purchaser of an out-of-state timeshare plan a copy of a purchase contract that contains the following statement located immediately prior to the space provided for the purchaser's signature:

   > "You may cancel this contract without any penalty or obligation within 10 days after the date you sign this contract. If you decide to cancel this contract, you must notify the seller in writing of your intent to cancel. Your notice of cancellation shall be effective upon the date sent and shall be sent to the seller at (address) . Any attempt to obtain a waiver of your cancellation right is void and of no effect. While you may execute all closing documents in advance, the closing, as evidenced by delivery of the deed or other document, before expiration of your 10-day cancellation period, is prohibited."

   The purchase contract must also include the purchase price and any additional costs that may be incurred, including but not limited to financing charges or annual assessments for common expenses.

3. All purchase contracts must also contain the following statements:

   - "This timeshare plan has not been reviewed or approved by the State of Florida."
   - "The timeshare interest you are purchasing requires certain procedures to be followed in order for you to use your interest. These procedures may be different from those followed in other timeshare plans. You should read and understand these procedures prior to purchasing."

4. The out-of-state timeshare plan can only be offered by a seller on behalf of:

   - The developer of a timeshare that has been approved by the division within the previous 7 years and has never had the plan terminated or withdrawn;
   - A developer that is co-owner with a developer, if the co-owner that owns at least a 50% interest meets the 7-year requirement above.

   The out-of-state timeshare plan can only be offered to a potential purchaser who already owns a timeshare interest in a plan filed by a developer who meets the 7-year requirement

5. The seller must provide notice of an out-of-state timeshare plan to the division, along with payment of a one-time fee not to exceed $1,000 per filing.

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[8] More specifically, this bill requires the disclosure statements for out-of-state timeshare plans to include the same information as required for in-state timeshares under s. 721.07(5)(e) - (cc) and exhibits required for in-state timeshare plans required under s. 721.07(5)(ff)1., 2., 3., 4., 5., 7., 8., and 20.

Out-of-state timeshare plans that meet these requirements are exempt from the requirements for in-state timeshare plans found in ss. 721.06[9], 721.065[10], 721.07[11], 721.27[12], 721.55[13], and 721.58[14], F.S.

This bill also provides that an escrow account established for an out-of-state timeshare plan can be maintained in the jurisdiction where the timeshare property is located, if the escrow agent submits to personal jurisdiction in this state in a manner satisfactory to the division.

Public Offering Statements

Present Situation

A developer that seeks to offer a potential purchaser an interest in a timeshare plan must first submit a filed public offering statement to the division for approval. Section 721.07, F.S., provides what information and disclosures a developer must include in the public offering statement in order for it to be approved by the division.

Under current law, a public offering statement must include a description of any financing to be offered to the purchaser by the developer, and a disclosure that the description of such financing may be changed by the developer and that any change offered to the purchaser will not be deemed to be a material change.

A public offering statement must also include a schedule of estimated closing expenses to be paid by a purchaser or lessee of a timeshare interest.

Proposed Changes

This bill deletes the requirement in s. 721.07, F.S., that a public offering statement must include a description of any financing offered to the purchaser by the developer, and deletes the requirement for disclosure to the purchaser that the financing can be changed and the change will not be deemed a material change.

This bill also provides that a schedule of estimated closing expenses to be paid by a purchaser or lessee of a timeshare interest does not have to be included in a public offering statement for any timeshare plan where purchases of timeshare interests are subject to the Real Estate Settlement Procedures Act[15]. The Real Estate Settlement Procedures Act already requires developers to provide this information to potential purchasers and lessees.

This bill grants the division the expressed authority to accept alternate forms of timeshare disclosure statements under an agreement with another state if they are substantially similar to what is required under s. 721.07, F.S. This bill grants the division rulemaking authority to implement this provision.

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[9] Section 721.06, F.S. provides for contracts for the purchase of timeshare interests.
[10] Section 721.065, F.S. provides for resale purchase agreements of timeshares
[11] Section 721.07, F.S. provides for timeshare public offering statements
[12] Section 721.27, F.S. provides for the annual fee for each timeshare unit in plan.
[13] Section 721.55, F.S. provides for multi-site timeshare plan public offering statements for vacation clubs.
[14] Section 721.58, F.S. provides for the filing fee and annual fee for vacation clubs.
[15] 12 U.S.C. s. 2601

Advertising of Timeshares

Present Situation

Section 721.11, F.S., provides that sellers of timeshare interests are prohibited from using false or misleading advertising or making false oral statements. Misrepresentation of the availability of a resale or rental program offered by or on behalf of the developer is prohibited.

Proposed Changes

This bill amends s. 721.11(4)(k), F.S., to broaden the prohibition against misrepresenting the availability of a resale or rental program to include resale or rental opportunity. According to the department, by deleting the modifying phrase "offered by or on behalf other developers" this broadens the prohibition to others such as resale service providers.

This bill also amends s. 721.11(4)(q), F.S., to add a prohibition against misrepresenting or falsely implying that the resale service provider is affiliated with, or obtained personal contact information from, a developer, managing entity or exchange company.

Definitions

Proposed Changes

This bill creates the following definitions to be used in ch. 721, F.S.:

- "Lead dealer" means any person who sells or otherwise provides a resale service provider or any other person with personal contact information for five or more owners of timeshare interests. In the event a lead dealer is not a natural person, the term shall also include the natural person providing personal contact information to a resale service provider or their person on behalf of the lead dealer entity. The term does not include developers, managing entities, or exchange companies to the extent they provide others with personal contact information about owners of timeshare interests in their own timeshare plans or members of their own exchange programs.

- "Personal contact information" means any information that can be used to contact the owner of a specific timeshare interest, including, but not limited to, the owner's name, address, telephone number, and e-mail address.

- "Resale service provider" means any person who uses unsolicited telemarketing, direct mail, or e-mail in connection with the offering of resale brokerage or resale advertising services to owners of timeshare interests. The term does not include:

    - Developers;
    - Managing entities of exchange companies (to the extent they offer resale brokerage); or
    - Resale advertising services to owners of timeshare interests in their own timeshare plans or members of their own exchange programs.

Recordkeeping by Resale Service Providers and Lead Dealers

Proposed Changes

The bill creates s. 721.121(1), F.S., to require resale service providers and lead dealers to maintain specific and extensive records for a period of five years on the lead dealer. The information required includes the name, home and work address, home, work, and cellular telephone numbers. It requires a

copy of a current government issued photographic identification, canceled checks, copies of all personal contact information in the exact form and media in which they were received, sources of the personal contact information, methodologies used for researching and assembling, photos identification and contact information for the individuals doing the research and assembling.

This bill also creates s. 721.121(2), F.S., to provide that in any civil or criminal action relating to wrongful possession or use of personal contact information by a resale service provider or lead dealer, any failure by a resale service provider or lead dealer to produce the records required by subsection (1) shall lead to a presumption that the personal contact information was wrongfully obtained.

This bill also creates s. 721.121(3), F.S., to provide that any use of personal contact information by a resale service provider or lead dealer that is wrongfully obtained shall be considered wrongful use and result in the resale service provider or lead dealer paying $1,000 for each owner about whom personal contact information was wrongfully obtained or used. Upon prevailing, the plaintiff shall be entitled to recover reasonable attorney's fees and costs.

Managing Entity

Present Situation

For each timeshare plan, the developer must provide for a managing entity, which must be either the developer, a separate manager or management firm, or an owners' association. Any owners' association must be created prior to the recording of the timeshare instrument.[16] Current law sets forth the duties of the managing entity.[17]

Proposed Changes

The bill amends s. 721.13(2), F.S., to provide that failure by a managing entity to obtain and maintain insurance coverage as required under s. 721.165, F.S., during any period of developer control of the managing entity is a breach of the managing entity's fiduciary duty.

However, the amendments in the bill to s. 721.165(5), F.S., limiting the liability of the managing entity regarding procuring and maintaining adequate insurance may make this provision inoperative.

The bill amends s. 721.13(3), F.S., to provide that reserves may be waived or reduced by a majority vote of the voting interests that are present, in person, or by proxy, at duly called meeting of the owners' association. The reserves as included in the budget go into effect if a vote is not obtained or a quorum is not attained.

Sections 712.13(12)(a) and 12(b), F.S., are created to provide that managing entities are authorized to manage the reservation and use of accommodations using those processes, analyses, procedures, and methods that are in the best interests of the owners as a whole. The managing entity must have the right to forecast anticipated reservations and use of accommodations using a variety of data and pertinent factors. It also is authorized to reserve accommodations, in the best interests of the owners as a whole, for the purposes of depositing the reserved use with an affiliated exchange program or renting the reserved accommodations in order to facilitate the use or future use of the accommodations or other benefits made available through the timeshare plan. This statement must be conspicuously disclosed in the public offering statement.

Section 712.13(12)(c), F.S., is created to provide that the managing entity must maintain copies for five years of all pertinent data utilized by the managing entity in its determination to reserve accommodations. If the division investigates the managing entity for failure to comply with the

[16] Section 721.13(1)(a), F.S.
[17] Section 721.13(3)(a) to (j), F.S.

subsection, the managing entity must make all records, data and information available for inspection. The records, data and information are considered a trade secret if the managing entity complies with the provision of the section on trade secrets in s. 721.071, F.S.

Assessments for Common Expenses

Present Situation

When calculating the obligation of a developer under a guarantee by the developer that the assessment of common expenses imposed upon the owners would not increase over a stated dollar amount, depreciation expenses related to real property shall be excluded from common expenses incurred during the guarantee period. There is an exception to this for real property that is used for the production of fees, revenues, or other income, and depreciation expenses are excluded only to the extent that they exceed the net income from the production of other fees, revenues or other income.

Proposed Changes

Section 721.15(2)(c), F.,S., is amended to provide that for purposes of calculating the obligation of a developer's guarantee, the cost of insurance must be excluded from common expenses, but any special assessment imposed for amounts excluded from the developer guarantee are to be paid proportionately by all the timeshare owners, including the developer for those timeshare interests owned by the developer.

Obtaining Insurance for the Accommodations and Facilities

Present Situation

Timeshare sellers, and thereafter the managing entity, are responsible for obtaining insurance to protect the accommodations and facilities in an amount equal to replacement cost. Failure to obtain and maintain the insurance during any period of control of the managing entity is a violation of s. 721.12(2)(a), F.S., unless the managing entity can show that it exercised due diligence. According to the Department of Business and Professional Regulation, insuring in an amount equal to replacement cost has become more problematic over the past few years.

Proposed Changes

This bill deletes the requirement in s. 721.165(1), F.S., which provides that insurance must be in an amount equal to the replacement cost of the accommodations and facilities. This bill requires that the managing entity use due diligence to obtain adequate casualty insurance against all reasonably foreseeable perils, subject to reasonable exclusions and reasonable deductibles. This provision is similar to the due diligence standard applicable to condominiums as provided in s. 718.111(11), F.S.

This bill creates s. 721.165(2), F.S. to provide for the factors taken into account when a managing entity must make a determination as to whether adequate insurance is obtained. The factors include:

- Available insurance coverage and related premiums in the marketplace;
- Amounts of any related deductibles, types of exclusions, and coverage limitations;
- The probable maximum loss relating to the insured timeshare property during the policy term;
- The extent to which a given peril is insurable under commercially reasonable terms;
- Amounts of any deferred maintenance or replacement reserves on hand;
- Geography and any special risks associated with the location of the timeshare property; and
- The age and type of construction of the timeshare property.

This bill creates s. 721.165(3), F.S., to provide that the cost of insurance is a common expense maintained by the managing entity for the timeshare property. The cost is subject to reasonable deductions or reasonable exclusions as may be required by:

- An institutional lender to a developer for as long as the lender holds a mortgage encumbering any interest in or lien against a portion of the timeshare property; or
- Any holder or pledgee of, or any institutional lender having a security interest in, a pool of promissory notes secured by mortgages or the security interests relating to the timeshare plan, executed by purchasers in connection with the purchasers' acquisition of timeshare interests in the timeshare property or any agent, underwriter, placement agent, trustee, service, custodian or other portfolio manager acting on behalf of the holder, pledgee, or institutional lender, for so long as any such notes and mortgages or other security interests remain outstanding.

This bill creates s. 721.165(4), F.S., to provide that the managing entity is authorized to apply any existing reserves for deferred maintenance and capital expenditures toward payment of insurance deductibles or the repair or replacement of the timeshare property after a casualty without regard to the purposes which the reserves were originally established.

This bill creates s. 721.165(5)(a), F.S., to provide that the managing entity is not liable for claims relating to the insufficiency or inadequacy of any insurance procured or maintained by the entity except for claims based on the gross negligence or willful misconduct of the managing entity.

This bill creates s. 721.165(5)(b), F.S., to provide that the managing entity is not liable for claims relating to insufficiency or inadequacy of insurance procured or maintained under any circumstances if the managing entity is approved or the insurance purchased is ratified by a majority of the owners of the timeshare plan. A minimum quorum of 15 percent of all owners, including the developer may approve or ratify this action. According to the department as little as 8 percent of the unit owners, including the developer, could exempt the managing entity, who may be the developer from any type of liability.

This bill creates s. 721.165(5)(c), F.S., to provide that the failure of the managing entity to request or obtain approval or ratification of an insurance plan or insurance coverage shall not be evidence of the gross negligence or willful misconduct of the managing entity.

Licensing Requirements

Present Situation

Section 721.20, F.S., provides that any seller of a timeshare plan must be a licensed real estate broker, broker associate, or sales associate as defined in s. 475.01, F.S., except as provided in s. 475.011, F.S. Solicitors who engage only in solicitation of prospective purchasers and any purchaser who refers no more than 20 people to a developer per year or who otherwise provides testimonials on behalf of a developer are exempt from the requirement to obtain a real estate broker or salesperson license under ch. 475 F.S.

Proposed Changes

This bill amends s. 721.20(1), F.S. to exempt from the real estate licensing requirements of ch. 475, F.S., any individual, corporation, partnership, trust, joint venture, or other entity that sells, exchanges, or leases its own timeshare interests, and any employee of such seller, regardless of whether such employee is paid a commission or their compensation to make such sales, exchanges, or leases of the seller's own timeshare interests to or with such seller's customers.

According to representatives from the timeshare industry, this provision would allow these persons to be paid by commission. Currently, such persons are salaried employees of the developer.

This bill amends s. 721.20(2), F.S., to exempt from real estate licensing requirements of ch 475, F.S., any person who engages only in the solicitation of prospective purchasers or who otherwise provides testimonials on behalf of a developer. This bill also deletes the qualification of any purchaser who refers no more than 20 people to the developer per year.

Conforming Provisions

This bill amends ss. 721.55 and 721.552, F.S. to conform to the changes made to the formula for funding reserve accounts, and to the ratio for determining the number of timeshare interests a developer can offer.

Timeshare Commissioner of Deeds

Present Situations

Section 721.97, F.S., provides that the Governor may appoint commissioners of deeds to take acknowledgments, proofs of execution, or oaths in any foreign country or any possession, territory, or commonwealth of the United States outside the 50 states.

Proposed Changes

This bill amends s. 721.97, F.S., to provide that the Governor may appoint a commissioner of deeds to also take acknowledgements, proofs of execution, or oaths in international waters. According to the representatives from the timeshare industry, this provision would allow a commissioner of deeds to operate on cruise ships.

C. SECTION DIRECTORY:

Section 1 amends s. 721.03, F.S., relating to the offering of out-of-state timeshares.

Section 2 amends s. 721.05, F.S., relating to the definition of "one-to-one use right to use night ratio", "lead dealer", and "personal contact information".

Section 3 amends s. 721.07, F.S., relating to a timeshare public offering statement.

Section 4 amends s. 721.075, F.S., relating to incidental benefits pertaining to timeshares.

Section 5 amends s. 721.11, F.S., relating to advertising materials and oral statements about timeshares.

Section 6 amends s. 721.121, F.S., relating to recordkeeping by resale service providers and lead dealers.

Section 7 amends s. 721.13, F.S., relating to management of timeshares.

Section 8 amends s. 721.15, F.S., relating to assessments for common expenses of timeshares.

Section 9 amends s. 721.165, F.S., relating to insurance for timeshare property obtained by the managing entity.

Section 10 amends s. 721.20, F.S., relating to licensing requirements for any seller of timeshare plans.

Section 11 amends s. 721.55, F.S., relating to public offering statements of multi-site timeshare plans.

Section 12 amends s. 721.552, F.S., relating to additions, substitutions, and deletions of a multi-site timeshare plan.

Section 13 amends s. 721.97, F.S., relating to the timeshare commissioner of deeds.

Section 14 provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT[18]

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The changes to s. 721.03, F.S., will exempt developers from registering certain out-of-state timeshare plans. Therefore, the Division of Florida Land Sales, Condominiums, and Mobile Homes (the division) within the Department of Business and Professional Regulation will not be receiving registration fees ($2/timeshare week) for those exempted timeshare plans. This will be partially offset by the one-time fee of $1,000 payable to the division by the developer for the developer's exercising this exemption from filing. There are currently 92 out-of-state timeshare projects (comprising 217,012 timeshare weeks) filed with the division. During FY 2005/06, 13 projects (comprising 59,091 timeshare weeks) were approved. The division is unable to determine the number of projects that would have been entitled to this exemption; however, based upon FY 2005/06 filings and if all 13 projects were to have been entitled to this exemption, the division would have received $13,000 in exemption fees instead of $118,182 in filing fees and $88,284 in annual fees (not all the out-of-state unit weeks were part of a multi-site timeshare plan).

2. Expenditures:

Non-Operating Expenditures	FY 2007-08	FY 2008-09	FY 2009-10
Service Charges (to General Revenue)	(14,123)	(14,123)	(14,123)
Other Indirect Costs	0	0	0
Subtotal	(14,123)	(14,123)	(14,123)

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill will require sellers of out-of-state timeshare plans to file notice of their plan to the Division of Florida Land Sales, Condominiums, and Mobile Homes along with payment of a $1,000 filing fee.

[18] Fiscal Analysis and all Fiscal Comments provided by DBPR, February 2007.

DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR	
Direct Private Sector Costs	Each seller who is entitled to the exemption and elects not to file a public offering statement with the department would pay a $1,000 exemption fee.
Direct Private Sector Benefits	Each seller who is entitled to the exemption and elects not to file a public offering statement with the department would not have to pay the $2/timeshare week fee.
Effects on Competition, Private Enterprise & Employment Markets	Unknown

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill amends s. 721.03(11)(a)5, F.S., to require a form to be prescribed by the division. Adequate rulemaking authorization is included and the bill provides sufficient guidance to the agency to promulgate a rule that meets delegated legislative authority.

This bill amends s. 721.03(11)(c), F.S., to require a form to be prescribed by the division. Adequate rulemaking authorization is included and the bill provides sufficient guidance to the agency to promulgate a rule that meets delegated legislative authority.

This bill amends s. 721.07(7), F.S., to provide that the division may adopt rules to implement this subsection. Adequate rulemaking authority is included and the bill provides sufficient guidance to the agency to promulgate a rule that meets delegated legislative authority.

The amendment to s. 721.13(3)(c)3, F.S., will require rule 61B-40.0062(2) to be repealed.

The amendment to s. 721.15(2)(c), F.S., will require rules 61B-40.005(4)(a) and 61B-40.005(5) to be amended.

The amendment to s. 721.165(4), F.S., will require rule 61B-40.0061(2) to be amended.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

N/A

A bill to be entitled

An act relating to vacation and timeshare plans; amending s. 721.03, F.S.; revising the formula for funding reserve accounts for conversions; authorizing a seller to offer timeshare interests in a timeshare plan located outside of this state without filing a public offering statement for such out-of-state timeshare plan; providing criteria for such offers; requiring certain notice; providing for a fee; conforming cross-references and terminology; amending s. 721.05, F.S.; revising the definition of the term "one-to-one purchaser to accommodation ratio"; providing definitions for the terms "lead dealer," "personal contact information," and "resale service provider"; amending s. 721.07, F.S.; revising information required to be contained in filed public offering statements for certain timeshare plans; authorizing the Division of Florida Land Sales, Condominiums, and Mobile Homes to accept alternate forms of timeshare disclosure statements; conforming cross-references; amending s. 721.075, F.S.; conforming terminology; amending s. 721.11, F.S.; revising provisions relating to advertising and oral statements to include those made by resale service providers; providing that a seller or resale service provider may not misrepresent or falsely imply that the resale service provider is affiliated with, or obtained personal contact information from, a developer, managing entity, or exchange company; creating s. 721.121, F.S.; providing recordkeeping requirements for resale service providers and lead

dealers; providing that the failure to produce such records in any civil or criminal action relating to the wrongful possession or wrongful use of personal contact information shall lead to a presumption that the personal contact information was wrongfully obtained; providing what constitutes wrongful use of such personal contact information; providing for recovery of certain damages and attorney's fees and costs; amending s. 721.13, F.S.; providing that failure to obtain and maintain required insurance coverage constitutes a breach of the managing entity's fiduciary duty; authorizing funding of reserve accounts to be waived or reduced; providing the managing entity with certain rights and powers; providing language to be included in public offering statements; providing recordkeeping requirements; requiring the managing entity to make certain records available to the division under certain circumstances; conforming cross-references; amending s. 721.15, F.S.; providing that amounts expended for any insurance coverage required by law or by the timeshare instrument to be maintained by the owners' association shall be exempt from assessment of common expenses; providing that any determination by a timeshare association of whether assessments exceed 115 percent of assessments for the prior fiscal year shall exclude anticipated expenses for required insurance coverage; amending s. 721.165, F.S.; revising provisions relating to insurance; requiring managing entities to use due diligence to obtain certain types of insurance; providing

factors that a managing entity must take into account in determining whether the insurance obtained is adequate; providing that insurance coverage may be subject to certain requirements; authorizing the managing entity to apply any existing reserves for certain purposes; exempting the managing entity from liability for certain claims; amending s. 721.20, F.S.; revising licensing requirements for sellers of timeshare plans; amending ss. 721.55 and 721.552, F.S.; conforming cross-references and terminology; amending s. 721.97, F.S.; authorizing the Governor to appoint commissioners of deeds to take acknowledgments, proofs of execution, or oaths in international waters; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (b) of subsection (1), paragraph (e) of subsection (3), and subsection (10) of section 721.03, Florida Statutes, are amended, and subsection (11) is added to that section, to read:

721.03 Scope of chapter.--

(1) This chapter applies to all timeshare plans consisting of more than seven timeshare periods over a period of at least 3 years in which the accommodations and facilities, if any, are located within this state or offered within this state; provided that:

(b) With respect to a timeshare plan containing accommodations or facilities located in this state which is

offered for sale outside the jurisdictional limits of the United States, such offer or sale shall be exempt from the requirements of this chapter, provided that the developer shall either file the timeshare plan with the division for approval pursuant to this chapter, or pay an exemption registration fee of $100 and file the following minimum information pertaining to the timeshare plan with the division for approval:

1. The name and address of the timeshare plan.

2. The name and address of the developer and seller, if any.

3. The location and a brief description of the accommodations and facilities, if any, that are located in this state.

4. The number of timeshare interests and timeshare periods to be offered.

5. The term of the timeshare plan.

6. A copy of the timeshare instrument relating to the management and operation of accommodations and facilities, if any, that are located in this state.

7. A copy of the budget required by s. 721.07(5)(t)~~(u)~~ or s. 721.55(4)(h)5., as applicable.

8. A copy of the management agreement and any other contracts regarding management or operation of the accommodations and facilities, if any, that are located in this state, and which have terms in excess of 1 year.

9. A copy of the provision of the purchase contract to be utilized in offering the timeshare plan containing the following

disclosure in conspicuous type immediately above the space provided for the purchaser's signature:

The offering of this timeshare plan outside the jurisdictional limits of the United States of America is exempt from regulation under Florida law, and any such purchase is not protected by the State of Florida. However, the management and operation of any accommodations or facilities located in Florida is subject to Florida law and may give rise to enforcement action regardless of the location of any offer.

(3) A timeshare plan which is subject to the provisions of chapter 718 or chapter 719, if fully in compliance with the provisions of this chapter, is exempt from the following:

(e) Part VI of chapter 718 and part VI of chapter 719, relating to conversion of existing improvements to the condominium or cooperative form of ownership, respectively, provided that a developer converting existing improvements to a timeshare condominium or timeshare cooperative must comply with ss. 718.606, 718.608, 718.61, and 718.62, or ss. 719.606, 719.608, 719.61, and 719.62, if applicable, and, if the existing improvements received a certificate of occupancy more than 18 months before such conversion, one of the following:

1. The accommodations and facilities shall be renovated and improved to a condition such that the remaining useful life in years of the roof, plumbing, air-conditioning, and any component of the structure which has a useful life less than the useful life of the overall structure is equal to the useful life of accommodations or facilities that would exist if such

accommodations and facilities were newly constructed and not previously occupied.

2. The developer shall fund reserve accounts for capital expenditures and deferred maintenance for the roof, plumbing, air-conditioning, and any component of the structure the useful life of which is less than the useful life of the overall structure. The reserve accounts shall be funded for each component in an amount equal to the product of the estimated current replacement cost of such component as of the date of such conversion (as disclosed and substantiated by a certificate under the seal of an architect or engineer authorized to practice in this state) multiplied by a fraction, the numerator of which shall be the age ~~remaining life~~ of the component in years (as disclosed and substantiated by a certificate under the seal of an architect or engineer authorized to practice in this state) and the denominator of which shall be the total useful life of the component in years (as disclosed and substantiated by a certificate under the seal of an architect or engineer authorized to practice in this state). Alternatively, the reserve accounts may be funded for each component in an amount equal to the amount that, except for the application of this subsection, would be required to be maintained pursuant to s. 718.618(1) or s. 719.618(1). The developer shall fund the reserve accounts contemplated in this subparagraph out of the proceeds of each sale of a timeshare interest, on a pro rata basis, in an amount not less than a percentage of the total amount to be deposited in the reserve account equal to the percentage of ownership allocable to the timeshare interest

sold. When an owners' association makes an expenditure of reserve account funds before the developer has initially sold all timeshare interests, the developer shall make a deposit in the reserve account if the reserve account is insufficient to pay the expenditure. Such deposit shall be at least equal to that portion of the expenditure which would be charged against the reserve account deposit that would have been made for any such timeshare interest had the timeshare interest been initially sold. When a developer deposits amounts in excess of the minimum reserve account funding, later deposits may be reduced to the extent of the excess funding.

3. The developer shall provide each purchaser with a warranty of fitness and merchantability pursuant to s. 718.618(6) or s. 719.618(6).

(10) A developer or seller may not offer any number of timeshare interests that would cause the total number of timeshare interests offered to exceed a one-to-one use right ~~purchaser~~ to use night requirement ~~accommodation~~ ratio.

(11)(a) A seller may offer timeshare interests in a real property timeshare plan located outside of this state without filing a public offering statement for such out-of-state real property timeshare plan pursuant to s. 721.07 or s. 721.55, provided all of the following criteria have been satisfied:

1. The seller shall provide a disclosure statement to each prospective purchaser of such out-of-state timeshare plan. The disclosure statement for a single-site timeshare plan shall contain information otherwise required under s. 721.07(5)(e)-(cc) and the exhibits required by s. 721.07(5)(ff)1., 2., 3.,

4., 5., 7., 8., and 20. The disclosure statement for a multisite timeshare plan shall contain information otherwise required under s. 721.55(4) and (5) and the exhibits required under s. 721.55(7). If a developer has, in good faith, attempted to comply with the requirements of this subsection and if the developer has substantially complied with the disclosure requirements of this subsection, nonmaterial errors or omissions shall not be actionable. With respect to any offer for an out-of-state timeshare plan made pursuant to this subsection, the delivery by the seller to a prospective purchaser of the disclosure statement required by this subparagraph shall be deemed to satisfy any requirement of this chapter regarding a public offering statement.

2. The seller shall utilize and furnish to each purchaser of an out-of-state timeshare plan offered under this subsection a fully completed and executed copy of a purchase contract that contains the statement set forth in s. 721.065(2)(c) in conspicuous type located immediately prior to the space in the contract reserved for the purchaser's signature. The purchase contract shall also contain the initial purchase price and any additional charges to which the purchaser may be subject in connection with the purchase of the timeshare plan, such as financing, or that will be collected from the purchaser on or before closing, such as the current year's annual assessment for common expenses.

3. All purchase contracts for out-of-state timeshare plans offered under this subsection must also contain the following statements in conspicuous type:

This timeshare plan has not been reviewed or approved by the State of Florida.

The timeshare interest you are purchasing requires certain procedures to be followed in order for you to use your interest. These procedures may be different from those followed in other timeshare plans. You should read and understand these procedures prior to purchasing.

4.a. An out-of-state timeshare plan may only be offered pursuant to this subsection by the seller on behalf of:

(I) The developer of a timeshare plan that has been approved by the division within the preceding 7 years pursuant to s. 721.07 or s. 721.55, or concerning which an amendment by the developer has been approved by the division within the preceding 7 years, which timeshare plan has been neither terminated nor withdrawn; or

(II) A developer under common ownership or control with a developer described in sub-sub-subparagraph (I), provided that any common ownership shall constitute at least a 50-percent ownership interest.

b. An out-of-state timeshare plan may only be offered pursuant to this subsection to a person who already owns a timeshare interest in a timeshare plan filed by a developer described in sub-subparagraph a.

5. Any seller of an out-of-state timeshare plan offered pursuant to this subsection shall be required to provide notice

of such plan to the division on a form prescribed by the division, along with payment of a one-time fee not to exceed $1,000 per filing.

(b) Timeshare plans offered pursuant to this subsection shall be exempt from the requirements of ss. 721.06, 721.065, 721.07, 721.27, 721.55, and 721.58 in addition to the exemptions otherwise applicable to accommodations and facilities located outside of the state pursuant to subparagraph (1)(c)1.

(c) Any escrow account required to be established by s. 721.08 for any out-of-state timeshare plan offered under this subsection may be maintained in the situs jurisdiction provided the escrow agent submits to personal jurisdiction in this state in a form satisfactory to the division.

Section 2. Subsection (25) of section 721.05, Florida Statutes, is amended, and subsections (42), (43), and (44) are added to that section, to read:

721.05 Definitions.--As used in this chapter, the term:

(25) "One-to-one use right ~~purchaser~~ to use night requirement ~~accommodation~~ ratio" means that the sum of the nights that owners are entitled to use in a given 12-month period shall not exceed the number of nights available for use by those owners during the same 12-month period. No individual timeshare unit may be counted as providing more than 365 use nights per 12-month period or more than 366 use nights per 12-month period that includes February 29. The use rights of each owner shall be counted without regard to whether the owner's use rights have been suspended for failure to pay assessments or otherwise ~~the ratio of the number of purchasers eligible to use~~

~~the accommodations of a timeshare plan on a given day to the number of accommodations available for use within the plan on that day, such that the total number of purchasers eligible to use the accommodations of the timeshare plan during a given calendar year never exceeds the total number of accommodations available for use in the timeshare plan during that year. For purposes of calculation under this subsection, each purchaser must be counted at least once, and no individual timeshare unit may be counted more than 365 times per calendar year (or more than 366 times per leap year). A purchaser who is delinquent in the payment of timeshare plan assessments shall continue to be considered eligible to use the accommodations of the timeshare plan for purposes of this subsection notwithstanding any application of s. 721.13(6).~~

(42) "Lead dealer" means any person who sells or otherwise provides a resale service provider or any other person with personal contact information for five or more owners of timeshare interests. In the event a lead dealer is not a natural person, the term shall also include the natural person providing personal contact information to a resale service provider or other person on behalf of the lead dealer entity. The term does not include developers, managing entities, or exchange companies to the extent they provide others with personal contact information about owners of timeshare interests in their own timeshare plans or members of their own exchange programs.

(43) "Personal contact information" means any information that can be used to contact the owner of a specific timeshare

interest, including, but not limited to, the owner's name, address, telephone number, and e-mail address.

(44) "Resale service provider" means any person who uses unsolicited telemarketing, direct mail, or e-mail in connection with the offering of resale brokerage or resale advertising services to owners of timeshare interests. The term does not include developers, managing entities, or exchange companies to the extent they offer resale brokerage or resale advertising services to owners of timeshare interests in their own timeshare plans or members of their own exchange programs.

Section 3. Paragraphs (n) through (v) of subsection (5) of section 721.07, Florida Statutes, are redesignated as paragraphs (m) through (u), present paragraphs (m) and (v) of that subsection are amended, and subsection (7) is added to that section, to read:

721.07 Public offering statement.--Prior to offering any timeshare plan, the developer must submit a filed public offering statement to the division for approval as prescribed by s. 721.03, s. 721.55, or this section. Until the division approves such filing, any contract regarding the sale of that timeshare plan is subject to cancellation by the purchaser pursuant to s. 721.10.

(5) Every filed public offering statement for a timeshare plan which is not a multisite timeshare plan shall contain the information required by this subsection. The division is authorized to provide by rule the method by which a developer must provide such information to the division.

~~(m) A description of any financing to be offered to purchasers by the developer or any person or entity in which the developer has a financial interest, together with a disclosure that the description of such financing may be changed by the developer and that any change in the financing offered to prospective purchasers will not be deemed to be a material change.~~

(u) ~~(v)~~ For any timeshare plan for which the purchase or closing of timeshare interests is not subject to the requirements of the Real Estate Settlement Procedures Act, 12 U.S.C. s. 2601 et seq., a schedule of estimated closing expenses to be paid by a purchaser or lessee of a timeshare interest.

(v) ~~and~~ A statement as to whether a title opinion or title insurance policy is available to the purchaser and, if so, at whose expense.

(ff) Copies of the following documents and plans, to the extent they are applicable, shall be included as exhibits to the filed public offering statement provided, if the timeshare plan has not been declared or created at the time of the filing, the developer shall provide proposed documents:

1. The declaration of condominium.

2. The cooperative documents.

3. The declaration of covenants and restrictions.

4. The articles of incorporation creating the owners' association.

5. The bylaws of the owners' association.

6. Any ground lease or other underlying lease of the real property associated with the timeshare plan. In the case of a

personal property timeshare plan, any lease of the personal property associated with the personal property timeshare plan.

7. The management agreement and all maintenance and other contracts regarding the management and operation of the timeshare property which have terms in excess of 1 year.

8. The estimated operating budget for the timeshare plan and the required schedule of purchasers' expenses.

9. The floor plan of each type of accommodation and the plot plan showing the location of all accommodations and facilities declared as part of the timeshare plan and filed with the division.

10. The lease for any facilities.

11. A declaration of servitude of properties serving the accommodations and facilities, but not owned by purchasers or leased to them or the owners' association.

12. Any documents required by s. 721.03(3)(e) as the result of the inclusion of a timeshare plan in the conversion of the building to condominium or cooperative ownership.

13. The form of agreement for sale or lease of timeshare interests.

14. The executed agreement for escrow of payments made to the developer prior to closing and the form of any agreement for escrow of ad valorem tax escrow payments, if any, to be made into an ad valorem tax escrow account pursuant to s. 192.037(6).

15. The documents containing any restrictions on use of the property required by paragraph (r) ~~(s)~~.

16. A letter from the escrow agent or filing attorney confirming that the escrow agent and its officers, directors, or

other partners are independent pursuant to the requirements of this chapter.

17. Any nondisturbance and notice to creditors instrument required by s. 721.08.

18. In the case of any personal property timeshare plan in which the accommodations and facilities are located on or in a documented vessel or foreign vessel as provided in s. 721.08(2)(c)3.e., a copy of the certificate of ownership of such vessel and either a copy of the certificate of documentation or certificate of registry of such vessel.

19. An executed affidavit given under oath by an attorney licensed to practice law in any jurisdiction in the United States stating that the attorney has researched the applicable laws of the jurisdiction in which governing law has been established and the laws of the jurisdiction in which the vessel is registered, and has found that the timeshare instrument complies with the provisions of s. 721.08(2)(c)3.e.(II)(C) and (III).

20. Any other documents or instruments creating the timeshare plan.

(7) The division may accept an alternate form of timeshare disclosure statement under an agreement with another state. At a minimum, the alternate form of timeshare disclosure statement must have provisions substantially similar to this section. The division may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection.

Section 4. Paragraph (d) of subsection (1) of section 721.075, Florida Statutes, is amended to read:

721.075 Incidental benefits.--Incidental benefits shall be offered only as provided in this section.

(1) Accommodations, facilities, products, services, discounts, or other benefits which satisfy the requirements of this subsection shall be subject to the provisions of this section and exempt from the other provisions of this chapter which would otherwise apply to such accommodations or facilities if and only if:

(d) The continued availability to purchasers of timeshare plan accommodations on no greater than a one-to-one use right ~~purchaser~~ to use night requirement ~~accommodation~~ ratio is not dependent upon continued availability of the incidental benefit.

Section 5. Subsection (4) of section 721.11, Florida Statutes, is amended to read:

721.11 Advertising materials; oral statements.--

(4) No advertising or oral statement made by any seller or resale service provider shall:

(a) Misrepresent a fact or create a false or misleading impression regarding the timeshare plan or promotion thereof.

(b) Make a prediction of specific or immediate increases in the price or value of timeshare interests.

(c) Contain a statement concerning future price increases by a seller which are nonspecific or not bona fide.

(d) Contain any asterisk or other reference symbol as a means of contradicting or substantially changing any previously made statement or as a means of obscuring a material fact.

(e) Describe any facility that is not required to be built or that is uncompleted unless the improvement is conspicuously

labeled as "NEED NOT BE BUILT," "PROPOSED," or "UNDER CONSTRUCTION." If the facility is labeled "NEED NOT BE BUILT" or "PROPOSED," the seller may indicate the estimated date that such facility will be made part of the timeshare plan. If the facility is labeled "UNDER CONSTRUCTION," the estimated date of completion must be included.

(f) Misrepresent the size, nature, extent, qualities, or characteristics of the offered accommodations or facilities.

(g) Misrepresent the amount or period of time during which the accommodations or facilities will be available to any purchaser.

(h) Misrepresent the nature or extent of any incidental benefit.

(i) Make any misleading or deceptive representation with respect to the contents of the public offering statement and the contract or the rights, privileges, benefits, or obligations of the purchaser under the contract or this chapter.

(j) Misrepresent the conditions under which a purchaser may exchange the right to use accommodations or facilities in one location for the right to use accommodations or facilities in another location.

(k) Misrepresent the availability of a resale or rental program or resale or rental opportunity ~~offered by or on behalf of the developer~~.

(l) Contain an offer or inducement to purchase which purports to be limited as to quantity or restricted as to time unless the numerical quantity or time limit applicable to the offer or inducement is clearly stated.

(m) Imply that a facility is available for the exclusive use of purchasers if the facility will actually be shared by others or by the general public.

(n) Purport to have resulted from a referral unless the name of the person making the referral can be produced upon demand of the division.

(o) Misrepresent the source of the advertising or statement by leading a prospective purchaser to believe that the advertising material is mailed by a governmental or official agency, credit bureau, bank, or attorney, if that is not the case.

(p) Misrepresent the value of any prize, gift, or other item to be awarded in connection with any prize and gift promotional offer, as described in s. 721.111, or any incidental benefit.

(q) Misrepresent or falsely imply that the resale service provider is affiliated with, or obtained personal contact information from, a developer, managing entity, or exchange company.

Section 6. Section 721.121, Florida Statutes, is created to read:

721.121 Recordkeeping by resale service providers and lead dealers.--

(1) Resale service providers and lead dealers shall maintain the following records for a period of 5 years from the date each piece of personal contact information is obtained:

(a) The name, home address, work address, home telephone number, work telephone number, and cellular telephone number of

the lead dealer from which the personal contact information was obtained.

(b) A copy of a current government-issued photographic identification for the lead dealer from which the personal contact information was obtained, such as a driver's license, passport, or military identification card.

(c) The date, time, and place of the transaction at which the personal contact information was obtained, along with the amount of consideration paid and a signed receipt from the lead dealer or copy of a canceled check.

(d) A copy of all pieces of personal contact information obtained in the exact form and media in which they were received.

(e) If personal contact information was directly researched and assembled by the resale service provider or lead dealer and not obtained from another lead dealer, a complete written description of the sources from which personal contact information was obtained, the methodologies used for researching and assembling it, the items set forth in paragraphs (a) and (b) for the individuals who performed the work, and the date such work was done.

(2) In any civil or criminal action relating to the wrongful possession or wrongful use of personal contact information by a resale service provider or lead dealer, any failure by a resale service provider or lead dealer to produce the records required by subsection (1) shall lead to a presumption that the personal contact information was wrongfully obtained.

(3) Any use by a resale service provider or lead dealer of personal contact information that is wrongfully obtained pursuant to this section shall be considered wrongful use of such personal contact information by the resale service provider or lead dealer, as applicable. Any party who establishes that a resale service provider or lead dealer wrongfully obtained or wrongfully used personal contact information with respect to owners of a timeshare plan or members of an exchange program shall, in addition to any other remedies that may be available in law or equity, be entitled to recover from such resale service provider or lead dealer an amount equal to $1,000 for each owner about whom personal contact information was wrongfully obtained or used. Upon prevailing, the plaintiff in any such action shall also be entitled to recover reasonable attorney's fees and costs.

Section 7. Paragraph (c) is added to subsection (2) of section 721.13, Florida Statutes, paragraph (c) of subsection (3) of that section is amended, and subsection (12) is added to that section, to read:

721.13 Management.--

(2)

(c) Failure by a managing entity to obtain and maintain insurance coverage as required under s. 721.165 during any period of developer control of the managing entity shall constitute a breach of the managing entity's fiduciary duty.

(3) The duties of the managing entity include, but are not limited to:

(c)1. Providing each year to all purchasers an itemized annual budget which shall include all estimated revenues and expenses. The budget shall be in the form required by s. 721.07(5)(t)~~(u)~~. The budget shall be the final budget adopted by the managing entity for the current fiscal year. The final adopted budget is not required to be delivered if the managing entity has previously delivered a proposed annual budget for the current fiscal year to purchasers in accordance with chapter 718 or chapter 719 and the managing entity includes a description of any changes in the adopted budget with the assessment notice and a disclosure regarding the purchasers' right to receive a copy of the adopted budget, if desired. The budget shall contain, as a footnote or otherwise, any related party transaction disclosures or notes which appear in the audited financial statements of the managing entity for the previous budget year as required by paragraph (e). A copy of the final budget shall be filed with the division for review within 30 days after the beginning of each fiscal year together with a statement of the number of periods of 7-day annual use availability that exist within the timeshare plan, including those periods filed for sale by the developer but not yet committed to the timeshare plan, for which annual fees are required to be paid to the division under s. 721.27.

2. Notwithstanding anything contained in chapter 718 or chapter 719 to the contrary, the board of administration of an owners' association which serves as the managing entity may from time to time reallocate reserves for deferred maintenance and capital expenditures required by s. 721.07(5)(t)~~(u)~~3.a.(XI) from

any deferred maintenance or capital expenditure reserve account to any other deferred maintenance or capital expenditure reserve account or accounts in its discretion without the consent of purchasers of the timeshare plan. Funds in any deferred maintenance or capital expenditure reserve account may not be transferred to any operating account without the consent of a majority of the purchasers of the timeshare plan. The managing entity may from time to time transfer excess funds in any operating account to any deferred maintenance or capital expenditure reserve account without the vote or approval of purchasers of the timeshare plan. In the event any amount of reserves for accommodations and facilities of a timeshare plan containing timeshare licenses or personal property timeshare interests exists at the end of the term of the timeshare plan, such reserves shall be refunded to purchasers on a pro rata basis.

3. With respect to any timeshare plan that has a managing entity that is an owners' association, reserves may be waived or reduced by a majority vote of those voting interests that are present, in person or by proxy, at a duly called meeting of the owners' association. If a meeting of the purchasers has been called to determine whether to waive or reduce the funding of reserves and no such result is achieved or a quorum is not attained, the reserves as included in the budget shall go into effect.

(12)(a) In addition to any other rights granted by the rules and regulations of the timeshare plan, the managing entity of a timeshare plan is authorized to manage the reservation and

use of accommodations using those processes, analyses, procedures, and methods that are in the best interests of the owners as a whole to efficiently manage the timeshare plan and encourage the maximum use and enjoyment of the accommodations and other benefits made available through the timeshare plan. The managing entity shall have the right to forecast anticipated reservation and use of the accommodations, including the right to take into account current and previous reservation and use of the accommodations, information about events that are scheduled to occur, seasonal use patterns, and other pertinent factors that affect the reservation or use of the accommodations. In furtherance of the provisions of this subsection, the managing entity is authorized to reserve accommodations, in the best interests of the owners as a whole, for the purposes of depositing such reserved use with an affiliated exchange program or renting such reserved accommodations in order to facilitate the use or future use of the accommodations or other benefits made available through the timeshare plan.

(b) A statement in conspicuous type, in substantially the following form, shall appear in the public offering statement as provided in s. 721.07:

The managing entity shall have the right to forecast anticipated reservation and use of the accommodations of the timeshare plan and is authorized to reasonably reserve, deposit, or rent the accommodations for the purpose of facilitating the use or future use of the accommodations or other benefits made available through the timeshare plan.

(c) The managing entity shall maintain copies of all records, data, and information supporting the processes, analyses, procedures, and methods utilized by the managing entity in its determination to reserve accommodations of the timeshare plan pursuant to this subsection for a period of 5 years from the date of such determination. In the event of an investigation by the division for failure of a managing entity to comply with this subsection, the managing entity shall make all such records, data, and information available to the division for inspection, provided that if the managing entity complies with the provisions of s. 721.071, any such records, data, and information provided to the division shall constitute a trade secret pursuant to that section.

Section 8. Paragraph (c) of subsection (2) of section 721.15, Florida Statutes, is amended, and subsection (11) is added to that section, to read:

721.15 Assessments for common expenses.--

(2)

(c) For the purpose of calculating the obligation of a developer under a guarantee pursuant to paragraph (b), amounts expended for any insurance coverage required by law or by the timeshare instrument to be maintained by the owners' association and depreciation expenses related to real property shall be excluded from common expenses incurred during the guarantee period, except that for real property that is used for the production of fees, revenues, or other income, depreciation expenses shall be excluded only to the extent that they exceed

the net income from the production of such fees, revenues, or other income. Any special assessment imposed for amounts excluded from the developer guarantee pursuant to this paragraph shall be paid proportionately by all owners of timeshare interests, including the developer with respect to the timeshare interests owned by the developer, in accordance with the timeshare instrument.

(11) Notwithstanding any provision of chapter 718 or chapter 719 to the contrary, any determination by a timeshare association of whether assessments exceed 115 percent of assessments for the prior fiscal year shall exclude anticipated expenses for insurance coverage required by law or by the timeshare instrument to be maintained by the association.

Section 9. Section 721.165, Florida Statutes, is amended to read:

721.165 Insurance.--

(1) Notwithstanding any provision contained in the timeshare instrument or in this chapter, chapter 718, or chapter 719 to the contrary, the ~~seller, initially, and thereafter the~~ managing entity~~,~~ shall use due diligence to obtain adequate casualty ~~be responsible for obtaining~~ insurance as a common expense of the timeshare plan to protect the timeshare property against all reasonably foreseeable perils, in such covered amounts and subject to such reasonable exclusions and reasonable deductibles as are consistent with the provisions of this section ~~accommodations and facilities of the timeshare plan in an amount equal to the replacement cost of such accommodations and facilities. Failure to obtain and maintain the insurance~~

~~required by this subsection during any period of developer control of the managing entity shall constitute a breach of s. 721.13(2)(a) by the managing entity, unless the managing entity can show that, despite such failure, it exercised due diligence to obtain and maintain the insurance required by this subsection~~.

(2) In making the determination as to whether the insurance obtained pursuant to subsection (1) is adequate, the managing entity shall take into account the following factors, among others as may be applicable:

(a) Available insurance coverages and related premiums in the marketplace.

(b) Amounts of any related deductibles, types of exclusions, and coverage limitations.

(c) The probable maximum loss relating to the insured timeshare property during the policy term.

(d) The extent to which a given peril is insurable under commercially reasonable terms.

(e) Amounts of any deferred maintenance or replacement reserves on hand.

(f) Geography and any special risks associated with the location of the timeshare property.

(g) The age and type of construction of the timeshare property.

(3) Notwithstanding any provision contained in this section or in the timeshare instrument to the contrary, insurance shall be procured and maintained by the managing entity for the timeshare property as a common expense of the

timeshare plan against such perils, in such coverages, and subject to such reasonable deductions or reasonable exclusions as may be required by:

(a) An institutional lender to a developer, for so long as such lender holds a mortgage encumbering any interest in or lien against a portion of the timeshare property; or

(b) Any holder or pledgee of, or any institutional lender having a security interest in, a pool of promissory notes secured by mortgages or other security interests relating to the timeshare plan, executed by purchasers in connection with such purchasers' acquisition of timeshare interests in such timeshare property, or any agent, underwriter, placement agent, trustee, servicer, custodian, or other portfolio manager acting on behalf of such holder, pledgee, or institutional lender, for so long as any such notes and mortgages or other security interests remain outstanding.

(4) Notwithstanding any provision contained in the timeshare instrument or in this chapter, chapter 718, or chapter 719 to the contrary, the managing entity is authorized to apply any existing reserves for deferred maintenance and capital expenditures toward payment of insurance deductibles or the repair or replacement of the timeshare property after a casualty without regard to the purposes for which such reserves were originally established.

(5) Notwithstanding any provision in the timeshare instrument or in this chapter, chapter 607, chapter 617, chapter 718, or chapter 719 to the contrary:

(a) The managing entity shall not be liable for any claims relating to the insufficiency or inadequacy of any insurance procured or maintained pursuant to this section other than claims based on the gross negligence or willful misconduct of the managing entity in procuring or maintaining such insurance.

(b) The managing entity shall not be liable for any claims relating to the insufficiency or inadequacy of any insurance procured or maintained pursuant to this section under any circumstances if the managing entity's plan for insurance coverage is approved, or if the insurance coverage actually procured by the managing entity is ratified, by a majority of the owners of the timeshare plan, including any developer, present in person or by proxy at a properly noticed meeting called for such purpose. A minimum quorum of 15 percent of all owners of the timeshare plan, including any developer, shall be required to attend the owner meeting contemplated by this paragraph in person or by proxy.

(c) The failure of the managing entity to request or obtain approval or ratification of an insurance plan or insurance coverage shall not be evidence of the gross negligence or willful misconduct of the managing entity pursuant to paragraph (a).

(6)~~(2)~~ A copy of each policy of insurance in effect shall be made available for reasonable inspection by purchasers and their authorized agents.

Section 10. Subsections (1) and (2) of section 721.20, Florida Statutes, are amended to read:

721.20 Licensing requirements; suspension or revocation of license; exceptions to applicability; collection of advance fees for listings unlawful.--

(1) Any seller of a timeshare plan must be a licensed real estate broker, broker associate, or sales associate as defined in s. 475.01; however, any individual, corporation, partnership, trust, joint venture, or other entity that sells, exchanges, or leases its own timeshare interests, and any employee of such seller, regardless of whether such employee is paid a commission or other compensation to make such sales, exchanges, or leases of the seller's own timeshare interests to or with such seller's customers, shall be exempt from the provisions of chapter 475~~, except as provided in s. 475.011~~.

(2) Any person ~~Solicitors~~ who engages ~~engage~~ only in the solicitation of prospective purchasers ~~and any purchaser who refers no more than 20 people to a developer per year~~ or who otherwise provides testimonials on behalf of a developer is ~~are~~ exempt from the provisions of chapter 475.

Section 11. Paragraphs (f) and (h) of subsection (4) and paragraph (l) of subsection (7) of section 721.55, Florida Statutes, are amended to read:

721.55 Multisite timeshare plan public offering statement.--Each filed public offering statement for a multisite timeshare plan shall contain the information required by this section and shall comply with the provisions of s. 721.07, except as otherwise provided therein. The division is authorized to provide by rule the method by which a developer must provide such information to the division. Each multisite timeshare plan

filed public offering statement shall contain the following information and disclosures:

(4) A text, which shall include, where applicable, the information and disclosures set forth in paragraphs (a)-(l).

(f) If the provisions of s. 721.552 and the timeshare instrument permit additions, substitutions, or deletions of accommodations or facilities, the public offering statement must include substantially the following information:

1. Additions.--

a. A description of the basis upon which new accommodations and facilities may be added to the multisite timeshare plan; by whom additions may be made; and the anticipated effect of the addition of new accommodations and facilities upon the reservation system, its priorities, its rules and regulations, and the availability of existing accommodations and facilities.

b. The developer must disclose the existence of any cap on annual increases in common expenses of the multisite timeshare plan that would apply in the event that additional accommodations and facilities are made a part of the plan.

c. The developer shall also disclose any extent to which the purchasers of the multisite timeshare plan will have the right to consent to any proposed additions; if the purchasers do not have the right to consent, the developer must include the following disclosure in conspicuous type:

Accommodations and facilities may be added to this multisite timeshare plan (or multisite vacation ownership plan

or multisite vacation plan or vacation club) without the consent of the purchasers. The addition of accommodations and facilities to the plan may result in the addition of new purchasers who will compete with existing purchasers in making reservations for the use of available accommodations and facilities within the plan, and may also result in an increase in the annual assessment against purchasers for common expenses.

2. Substitutions.--

a. A description of the basis upon which new accommodations and facilities may be substituted for existing accommodations and facilities of the multisite timeshare plan; by whom substitutions may be made; the basis upon which the determination may be made to cause such substitutions to occur; and any limitations upon the ability to cause substitutions to occur.

b. The developer shall also disclose any extent to which purchasers will have the right to consent to any proposed substitutions; if the purchasers do not have the right to consent, the developer must include the following disclosure in conspicuous type:

New accommodations and facilities may be substituted for existing accommodations and facilities of this multisite timeshare plan (or multisite vacation ownership plan or multisite vacation plan or vacation club) without the consent of the purchasers. The replacement accommodations and facilities may be located at a different place or may be of a different

type or quality than the replaced accommodations and facilities. The substitution of accommodations and facilities may also result in an increase in the annual assessment against purchasers for common expenses.

3. Deletions.--A description of any provision of the timeshare instrument governing deletion of accommodations or facilities from the multisite timeshare plan. If the timeshare instrument does not provide for business interruption insurance in the event of a casualty, or if it is unavailable, or if the instrument permits the developer, the managing entity, or the purchasers to elect not to reconstruct after casualty under certain circumstances or to secure replacement accommodations or facilities in lieu of reconstruction, the public offering statement must contain a disclosure that during the reconstruction, replacement, or acquisition period, or as a result of a decision not to reconstruct, purchasers of the plan may temporarily compete for available accommodations on a greater than one-to-one use right ~~purchaser~~ to use night requirement ~~accommodation~~ ratio.

(h) A description of the purchaser's liability for common expenses of the multisite timeshare plan, including the following:

1. A description of the common expenses of the plan, including the method of allocation and assessment of such common expenses, whether component site common expenses and real estate taxes are included within the total common expense assessment of the multisite timeshare plan, and, if not, the manner in which

timely payment of component site common expenses and real estate taxes shall be accomplished.

2. A description of any cap imposed upon the level of common expenses payable by the purchaser. In no event shall the total common expense assessment for the multisite timeshare plan in a given calendar year exceed 125 percent of the total common expense assessment for the plan in the previous calendar year.

3. A description of the entity responsible for the determination of the common expenses of the multisite timeshare plan, as well as any entity which may increase the level of common expenses assessed against the purchaser at the multisite timeshare plan level.

4. A description of the method used to collect common expenses, including the entity responsible for such collections, and the lien rights of any entity for nonpayment of common expenses. If the common expenses of any component site are collected by the managing entity of the multisite timeshare plan, a statement to that effect together with the identity and address of the escrow agent required by s. 721.56(3).

5. If the purchaser will receive an interest in a nonspecific multisite timeshare plan, a statement that a multisite timeshare plan budget is attached to the public offering statement as an exhibit pursuant to paragraph (7)(c). The multisite timeshare plan budget shall comply with the provisions of s. 721.07(5)(t)~~(u)~~.

6. If the developer intends to guarantee the level of assessments for the multisite timeshare plan, such guarantee must be based upon a good faith estimate of the revenues and

expenses of the multisite timeshare plan. The guarantee must include a description of the following:

a. The specific time period, measured in one or more calendar or fiscal years, during which the guarantee will be in effect.

b. A statement that the developer will pay all common expenses incurred in excess of the total revenues of the multisite timeshare plan, if the developer is to be excused from the payment of assessments during the guarantee period.

c. The level, expressed in total dollars, at which the developer guarantees the assessments. If the developer has reserved the right to extend or increase the guarantee level, a disclosure must be included to that effect.

7. If required under applicable law, the developer shall also disclose the following matters for each component site:

a. Any limitation upon annual increases in common expenses;

b. The existence of any bad debt or working capital reserve; and

c. The existence of any replacement or deferred maintenance reserve.

(7) The following documents shall be included as exhibits to the filed public offering statement, if applicable:

(l)1. If the multisite timeshare plan contains any component sites located in this state, the information required by s. 721.07(5) pertaining to each such component site unless exempt pursuant to s. 721.03.

2. If the purchaser will receive a timeshare estate pursuant to s. 721.57, or an interest in a specific multisite timeshare plan, in a component site located outside of this state but which is offered in this state, the information required by s. 721.07(5) pertaining to that component site, provided, however, that the provisions of s. 721.07(5)(t) ~~(u)~~ shall only require disclosure of information related to the estimated budget for the timeshare plan and purchaser's expenses as required by the jurisdiction in which the component site is located.

Section 12. Paragraph (b) of subsection (1), paragraph (g) of subsection (2), and subsection (3) of section 721.552, Florida Statutes, are amended to read:

721.552 Additions, substitutions, or deletions of component site accommodations or facilities; purchaser remedies for violations.--Additions, substitutions, or deletions of component site accommodations or facilities may be made only in accordance with the following:

(1) ADDITIONS.--

(b) Any person who is authorized by the timeshare instrument to make additions to the multisite timeshare plan pursuant to this subsection shall act as a fiduciary in such capacity in the best interests of the purchasers of the plan as a whole and shall adhere to the demand balancing standard set forth in s. 721.56(6) in connection with such additions. Additions that are otherwise permitted may be made only so long as a one-to-one use right ~~purchaser~~ to use night requirement ~~accommodation~~ ratio is maintained at all times.

(2) SUBSTITUTIONS.--

(g) The person who is authorized by the timeshare instrument to make substitutions to the multisite timeshare plan pursuant to this subsection shall act as a fiduciary in such capacity in the best interests of the purchasers of the plan as a whole and shall adhere to the demand balancing standard set forth in s. 721.56(6) in connection with such substitutions. Substitutions that are otherwise permitted may be made only so long as a one-to-one use right ~~purchaser~~ to use night requirement ~~accommodation~~ ratio is maintained at all times.

(3) DELETIONS.--

(a) Deletion by casualty.--

1. Pursuant to s. 721.165, the timeshare instrument creating the multisite timeshare plan must provide for casualty insurance for the accommodations and facilities of the multisite timeshare plan in an amount equal to the replacement cost of such accommodations or facilities. The timeshare instrument must also provide that in the event of a casualty that results in accommodations or facilities being unavailable for use by purchasers, the managing entity shall notify all affected purchasers of such unavailability of use within 30 days after the event of casualty.

2. The timeshare instrument must also provide for the application of any insurance proceeds arising from a casualty to either the replacement or acquisition of additional similar accommodations or facilities or to the removal of purchasers from the multisite timeshare plan so that purchasers will not be competing for available accommodations on a greater than one-to-

one use right ~~purchaser~~ to use night requirement ~~accommodation~~ ratio.

3. If the timeshare instrument does not provide for business interruption insurance, or if it is unavailable, or if the instrument permits the developer, the managing entity, or the purchasers to elect not to reconstruct after casualty under certain circumstances or to secure replacement accommodations or facilities in lieu of reconstruction, purchasers of the plan may temporarily compete for available accommodations on a greater than one-to-one use right ~~purchaser~~ to use night requirement ~~accommodation~~ ratio. The decision whether or not to reconstruct shall be made as promptly as possible under the circumstances.

4. Any replacement of accommodations or facilities pursuant to this paragraph shall be made upon the same basis as required for substitution as set forth in subparagraph (2)(b)2.

(b) Deletion by eminent domain.--

1. The timeshare instrument creating the multisite timeshare plan must also provide for the application of any proceeds arising from a taking under eminent domain proceedings to either the replacement or acquisition of additional similar accommodations or facilities or to the removal of purchasers from the multisite timeshare plan so that purchasers will not be competing for available accommodations on a greater than one-to-one use right ~~purchaser~~ to use night requirement ~~accommodation~~ ratio.

2. Any replacement of accommodations or facilities pursuant to this paragraph shall be made upon the same basis as required for substitution set forth in subparagraph (2)(b)2.

(c) Automatic deletion.--The timeshare instrument may provide that a component site will be automatically deleted upon the expiration of its term in a timeshare plan other than a nonspecific multisite timeshare plan or as otherwise provided in the timeshare instrument. However, the timeshare instrument must also provide that in the event a component site is deleted from the plan in this manner, a sufficient number of purchasers of the plan will also be deleted so as to maintain no greater than a one-to-one use right ~~purchaser~~ to use night requirement ~~accommodation~~ ratio.

Section 13. Subsection (1) of section 721.97, Florida Statutes, is amended to read:

721.97 Timeshare commissioner of deeds.--

(1) The Governor may appoint commissioners of deeds to take acknowledgments, proofs of execution, or oaths in any foreign country, in international waters, or in any possession, territory, or commonwealth of the United States outside the 50 states. The term of office is 4 years. Commissioners of deeds shall have authority to take acknowledgments, proofs of execution, and oaths in connection with the execution of any deed, mortgage, deed of trust, contract, power of attorney, or any other writing to be used or recorded in connection with a timeshare estate, personal property timeshare interest, timeshare license, any property subject to a timeshare plan, or the operation of a timeshare plan located within this state; provided such instrument or writing is executed outside the United States. Such acknowledgments, proofs of execution, and oaths must be taken or made in the manner directed by the laws

of this state, including but not limited to s. 117.05(4), (5)(a), and (6), Florida Statutes 1997, and certified by a commissioner of deeds. The certification must be endorsed on or annexed to the instrument or writing aforesaid and has the same effect as if made or taken by a notary public licensed in this state.

Section 14. This act shall take effect July 1, 2007.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No 1 (for drafter's use only)

Bill No **HB 405**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

Council/Committee hearing bill Committee on Courts

Representative Mealor offered the following

Amendment

Remove line(s) 709-710 and insert

(b) Amounts of any related deductibles, types of exclusions, and coverage limitations, provided that for purposes of this paragraph a deductible of 5% or less shall be deemed to be reasonable per se

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No 2 (for drafter's use only)

Bill No **HB 405**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	____

Council/Committee hearing bill Committee on Courts

Representative Mealor offered the following

Amendment (with title amendments)

Remove line(s) 749-796 and insert

(5) ~~(2)~~ A copy of each policy of insurance in effect shall be made available for reasonable inspection by purchasers and their authorized agents

========== T I T L E A M E N D M E N T ==========

Remove line(s) 62-64 and insert

amending ss

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 407 Condominiums
SPONSOR(S): Schwartz
TIED BILLS: None **IDEN./SIM. BILLS:** SB 314

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Courts		Blalock	Bond
2) Safety & Security Council			
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

Recent catastrophic destructions of condominium buildings have highlighted the difficulties related to termination under current law. Unless otherwise provided for in the covenants of a condominium association, current law requires the consent of all the unit owners and all the holders of the recorded liens affecting any of the condominium units for termination of the condominium association; and requires distribution of the proceeds of the insurance and the sale of the land on a basis that may not be equitable.

This bill amends the law regarding condominium termination to:

- Provide for approval by less than 100% of owners and lienholders;
- Provide alternative methods for determining the allocation of proceeds from the sale of condominium property;
- Set forth procedures for management of the association and for distribution of the proceeds; and
- Provide for dissent and court review of a plan of termination.

The provisions of this bill apply to condominium associations currently in existence.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill appears to increase the options that individuals have regarding termination of their condominium association.

B. EFFECT OF PROPOSED CHANGES:

Background

Condominiums are creatures of statute, and are thereby subject to the control and regulation of the legislature, which has broad discretion in its regulatory efforts, especially in fashioning remedies necessary to protect the interests of those persons involved.

Chapter 718, F.S., the "Condominium Act," governs condominium associations. Section 718.117, F.S., provides for termination of a condominium. The declaration of condominium may have different requirements for termination than those provided for in statute, although it is common for associations to not have any provision for termination.

Unless the declaration provides otherwise, termination of a condominium requires the consent of all the unit owners and all the holders of the recorded liens affecting any of the condo parcels.[1] Achieving such consent is difficult under normal circumstances. Recent catastrophic events have revealed that achieving this unanimous consent can be exceedingly difficult. Some of the reasons for this difficulty include:

- Poorly drafted covenants, including covenants that have no provision for termination.
- Where the building is damaged to the point that it is not habitable, the occupants scatter and owners can be difficult to find.
- Working with the estates of owners killed in the catastrophe.
- Holdout or difficult owners.
- Absentee owners who live in other states or countries.
- Disputes with insurance companies that lead to uncertainty in the amount of proceeds available for distribution to owners.
- Unresponsive lenders.
- Members of the board are often as unavailable as the owners they represent, sometimes leading to a failure of leadership.
- The default statutory distribution formula does not take into account the sometimes substantial differences in fair market values of units based upon their condition or location in the structure.

Effect of the Bill

The bill substantially amends and re-writes s. 718.117, F.S., regarding the method and process for termination of a condominium. Many provisions are simply moved within the section with grammatical and editorial changes. The substantive changes are summarized here:

Legislative Findings

The bill makes the following legislative findings:

[1] Section 718.117(1), F.S.

The Legislature finds that condominiums are created as authorized by statute. In circumstances that may create economic waste, areas of disrepair, or obsolescence of a condominium property for its intended use and thereby lower property tax values, the Legislature further finds that it is the public policy of this state to provide by statute a method to preserve the value of the property interests and the rights of alienation thereof that owners have in the condominium property before and after termination. The Legislature further finds that it is contrary to the public policy of this state to require the continued operation of a condominium when to do so constitutes economic waste or when the ability to do so is made impossible by law or regulation. This section applies to all condominiums in this state in existence on or after July 1, 2007.

Termination of Condominium - Vote Required

Section 718.117(1), F.S., requires unanimous consent of all owners and lienholders to terminate the condominium, unless a lower threshold is provided for in the declaration. This applies regardless of the circumstances that lead to a decision to terminate the condominium.

This bill provides that, where the continued operation of the condominium would constitute economic waste or would be impossible, the necessary vote for termination is the vote required for amendment of the declaration. In general, amendment of a declaration of condominium requires a two-thirds vote of the membership, unless otherwise provided for in the declaration.[2] The criteria for economic waste or impossibility are:

- The total estimated cost of repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs; or
- It becomes impossible to operate or reconstruct a condominium in its prior physical configuration because of land-use laws or regulations.

The bill further provides that, regardless of whether continued operation would constitute economic waste or would be impossible, the condominium may be terminated if approved by at least 80 percent of the total voting interests of the condominium, unless the declaration provides for a lower threshold.

However, if 75% or more of the condominium units are timeshare units, the condominium may only be terminated by a plan of termination that is approved by 80% of the total voting interests of the association and the holders of 80% of the original principal amount of outstanding recorded mortgage liens of timeshare estates in the condominium, unless the declaration provides for a lower voting percentage.

Mortgage Lienholders

Current law requires approval of all mortgage lienholders to terminate a condominium. This bill provides that approval is not required if the mortgage lienholder is to be paid in full from the termination proceeds. If the mortgage holder will not be paid in full and does not approve of the plan of termination, the mortgage holder has 90 days to contest plan (see contest provisions below).

[2] Section 718.110(1)(a), F.S. The bill also provides that a plan of termination is not an amendment subject to s. 718.110(4), F.S., which section relates to amendments that may change the configuration or size of any unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium. Such amendments essentially require, like a termination under current law, a 100% vote of owners and lienholders.

Receivership

Current law provides a mechanism whereby the condominium can be placed into receivership after a natural disaster.[3] Receivership is a form of court supervision over the ongoing management and affairs of the association with the end result being termination of the condominium and distribution of the net proceeds to the parties entitled to such proceeds. In relation to receivership, this bill adds a requirement for quarterly financial reporting, specifies that members of a termination board are subject to recall, and provides that lenders representing 50% of the outstanding mortgage balances on the condominium units may petition the court for appointment of a termination trustee.

Plan of Termination

Current law does not require a written plan of termination, although it is likely that owners would not vote to approve termination of the condominium without there being a plan of how to sell the condominium property and distribute the proceeds of the sale to lienholders and owners. This bill specifies what must be in a plan of termination.

A plan of termination must be a written document executed by owners and by the termination trustee. A copy of a proposed plan must be given to all unit owners.[4] Approval of the plan may either be at an owner's meeting or by written consent of owners.[5] If approved by the required number of owners and lienholders, the plan must be recorded in the public records. The plan is effective only upon recordation or at a later date specified in the plan.

A plan must specify:

- The name, address, and powers of the termination trustee;
- A date after which the plan of termination is void if it has not been recorded;
- The interests of the respective unit owners in the association property, common surplus, and other assets of the association, which will be the same as the respective interests of the unit owners in the common elements immediately before the termination, unless otherwise provided;
- The interests of the respective unit owners in any proceeds from any sale of the condominium property. The plan of termination may apportion those proceeds pursuant to any of the methods prescribed in s. 718.117(12) (see the discussion below regarding the allocation of property). If, condominium property or real property owned by the association is to be sold following termination, the plan must provide for the sale and may establish any minimum sale terms; and
- Any interests of the respective unit owners in any insurance proceeds or condemnation proceeds that are not used for repair or reconstruction. Unless the declaration expressly addresses the distribution of insurance proceeds or condemnation proceeds, the plan of termination may apportion those proceeds pursuant to any of the methods prescribed in s. 718.117(12) (see the discussion below regarding the allocation of property).

The plan may additionally provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the plan must specify the conditions of possession.

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[3] Section 718.117(4), F.S.

[4] The notice must be given either in the same manner as for notice of an annual meeting and at least 14 days prior to the meeting during which the plan is to be voted upon, or must be sent together with a consent document.

[5] Any written consent must be signed with the formality of a deed; i.e., two witnesses and a notary.

In the case of a conditional termination, the plan must specify the conditions for termination. A conditional plan will not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed, confirming that the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests, have been recorded.

Allocation of Proceeds of Sale of Condominium Property

Current law provides that, upon termination, unless otherwise provided for in the declaration, each owner will receive a proportionate share in the net proceeds from sale of the condominium in proportion to each owner's share of the common elements.[6]

This bill substantially changes the provisions regarding distribution of the proceeds. Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair-market values immediately before the termination. The market values are to be determined by one or more independent appraisers selected by the association or termination trustee. The value of the common elements is to be paid to the owners according to their proportionate share in the common elements, as in current law.

The portion of proceeds allocated to the units is apportioned among the individual units. Any one of the following methods of apportionment are allowed:

- The respective values of the units based on the fair-market values of the units immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee.
- The respective values of the units based on the most recent market value of the units before the termination, as provided in the county property appraiser's records.
- The respective interests of the units in the common elements specified in the declaration immediately before the termination.
- Any other method of apportionment in the plan of termination that achieves the necessary approval.

Liens that encumber a unit are transferred to the proceeds of the sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in their same priority. The proceeds of any sale of condominium property pursuant to a plan of termination may not be deemed to be common surplus or association property.

Termination Trustee

Current law does not specify who is to carry out the termination, manage the property during the process, and distribute the proceeds. This bill provides that the existing association will serve as termination trustee unless another person is appointed in the plan of termination. This bill also provides that, If the association is unable, unwilling, or fails to act as trustee, any unit owner may petition the court to appoint a trustee. Upon approval of the plan of termination, the termination trustee takes title to the association assets.

Notice

Current law does not require notice of the termination. This bill requires the termination trustee to give notice to every owner and lienor of the termination within 30 days after a plan has been recorded, and requires that the division[7] be notified within 90 days.

[6] Section 718.117(7), F.S.

Right to Contest

Current law does not provide a means or time for contesting the termination of a condominium. This bill provides that a unit owner or lienor may contest a plan within 90 days after the date the plan is recorded. A unit owner or lienor who fails to contest the plan within that period is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property. In an action contesting a plan, the person contesting the plan has the burden of pleading and proving that the apportionment of the proceeds from the sale among the unit owners was not fair and reasonable. However, the apportionment of sale proceeds is presumed fair and reasonable if it was determined pursuant to the methods prescribed above regarding the allocation of property.

The court may void the plan or modify the plan of termination to provide for a fair and reasonable apportionment of the proceeds. The prevailing party may recover reasonable attorney's fees and costs.

Distribution

Current law does not specify the procedures for distribution of the proceeds to owners and lienholders. This bill provides a termination trustee acts as trustee for unit owners and holders of liens on the units, in their order of priority.

Not less than 30 days prior to the first distribution, the termination trustee must deliver by certified mail, return receipt requested, a notice of the estimated distribution to all unit owners, lienors of the condominium property, and lienors of each unit at their last known addresses stating a good-faith estimate of the amount of the distributions to each class and the procedures and deadline for notifying the termination trustee of any objections to the amount. The deadline must be at least 15 days after the date the notice was mailed.

If a unit owner or lienor files a timely objection with the termination trustee, the trustee does not have to distribute the funds and property allocated to the respective unit owner or lienor until the trustee has had a reasonable time to determine the validity of the adverse claim. In the alternative, the trustee may interplead[8] the unit owner, lienor, and any other person claiming an interest in the unit and deposit the funds allocated to the unit in the court registry, at which time the condominium property, association property, common surplus, and other assets of the association are free of all claims and liens of the parties to the suit. In an interpleader action, the trustee and prevailing party may recover reasonable attorney's fees and costs and court costs.

The proceeds of any sale of condominium property or association property and any remaining condominium property or association property, common surplus, and other assets must be distributed in the following priority:

1. To pay the reasonable termination trustee's fees and costs and accounting fees and costs;

2. To lienholders of liens recorded prior to the recording of the declaration;

3. To purchase money lienholders on units to the extent necessary to satisfy their liens.

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[7] Division refers to the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation. Section 718.103(17), F.S.

[8] "interplead" means to assert one's claim regarding property. In an interpleader action, a stakeholder deposits disputed property into a court's registry to abide the court's decision about who is entitled to the property.

4. To lienholders of liens of the association which have been consented to;[9]

5. To creditors of the association, as their interests appear;

6. To unit owners, the proceeds of any sale of condominium property subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or lienor;

7. To unit owners, the remaining condominium property, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor;

8. To unit owners, the proceeds of any sale of association property, the remaining association property, common surplus, and other assets of the association, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor.

After determining that all known debts and liabilities of an association in the process of termination have been paid or adequately provided for, the termination trustee will distribute the remaining assets pursuant to the plan. If the termination is by court proceeding, the distribution may not be made until any period for the presentation of claims ordered by the court has elapsed.

Assets held by an association upon a valid condition requiring return, transfer, or conveyance, which condition has occurred or will occur, will be returned, transferred, or conveyed in accordance with the condition. The remaining association assets shall be distributed pursuant to the priority order above.

C. SECTION DIRECTORY:

Section 1 amends s. 718.117, F.S., relating to termination of a condominium association.

Section 2 provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

[9] Section 718.121(1), F.S., requires the unanimous consent of the unit owners before a lien is valid against the condominium as a whole.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill provides increased opportunity for condominium owners who are a part of an uneconomic condominium to terminate that condominium; thereby allowing for greater flexibility in the investment or reinvestment of capital.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

This bill may implicate the Contract Clause of the Florida Constitution, since some of the changes in this bill apply to existing associations. Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."[10]

"A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."[11] The Supreme Court of Florida held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.[12] The Court indicated that the "well-accepted" principle in this state is that virtually no degree of contract impairment is tolerable.[13] When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy."[14]

This bill may possibly modify existing contractual relationships between the owners a condominium unit and condominium association or a lending institution, and thus it may perhaps give rise to a constitutional concern that the bill impairs the obligation of contracts. However, in evaluating modifications of contractual rights in the relationship between condominium owners and their association or lending institution, the Florida Supreme Court has stated that "It may be assumed that the parties made their contract with knowledge of the power of the State to change the remedy or method of enforcing the contract, which may be done by a State without impairing contract obligations." *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So.2d 881, 887 (Fla. 1974), quoting from *Mahood v. Bessemer Properties, Inc.*, 18 So.2d 775 (Fla. 1944). Because condominiums are highly regulated by current law, condominium owners and associations enter into contracts with the knowledge that new laws may be passed which could change some aspect of current contractual

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[10] Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . . "

[11] 10a Fla. Jur. s. 414, Constitutional Law. The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

[12] *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979). The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

[13] *Pomponio*, 378 So. 2d at 780.

[14] *Id.*

obligations. The courts have held that in these types of situations the State may pass certain laws affecting current contracts without violating the United States or Florida Constitution.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

This is the same bill that was unanimously approved last year without the provisions objected to in the Governor's veto message.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

N/A

A bill to be entitled

An act relating to condominiums; amending s. 718.117, F.S.; substantially revising provisions relating to the termination of the condominium form of ownership of a property; providing legislative findings; providing grounds for termination; providing powers and duties of the board of administration of the association; waiving certain notice requirements following natural disasters; providing requirements for a plan of termination; providing for the allocation of proceeds from the sale of condominium property; providing powers and duties of a termination trustee; providing notice requirements; providing a procedure for contesting a plan of termination; providing for award or recovery of attorney's fees and costs; providing rules for the distribution of property and sale proceeds; providing for the association's status following termination; allowing the creation of another condominium by the trustee; specifying an exclusion; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 718.117, Florida Statutes, is amended to read:

(Substantial rewording of section. See s. 718.117, F.S., for present text.)

718.117 Termination of condominium.--

(1) LEGISLATIVE FINDINGS.--The Legislature finds that

condominiums are created as authorized by statute. In circumstances that may create economic waste, areas of disrepair, or obsolescence of a condominium property for its intended use and thereby lower property tax values, the Legislature further finds that it is the public policy of this state to provide by statute a method to preserve the value of the property interests and the rights of alienation thereof that owners have in the condominium property before and after termination. The Legislature further finds that it is contrary to the public policy of this state to require the continued operation of a condominium when to do so constitutes economic waste or when the ability to do so is made impossible by law or regulation. This section applies to all condominiums in this state in existence on or after July 1, 2007.

(2) TERMINATION BECAUSE OF ECONOMIC WASTE OR IMPOSSIBILITY.--

(a) Notwithstanding any provision to the contrary in the declaration, the condominium form of ownership of a property may be terminated by a plan of termination approved by the lesser of the lowest percentage of voting interests necessary to amend the declaration or as otherwise provided in the declaration for approval of termination when:

1. The total estimated cost of repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs; or

2. It becomes impossible to operate or reconstruct a

condominium in its prior physical configuration because of land-use laws or regulations.

(b) Notwithstanding paragraph (a), a condominium in which 75 percent or more of the units are timeshare units may be terminated only pursuant to a plan of termination approved by 80 percent of the total voting interests of the association and the holders of 80 percent of the original principal amount of outstanding recorded mortgage liens of timeshare estates in the condominium, unless the declaration provides for a lower voting percentage.

(3) OPTIONAL TERMINATION.--Except as provided in subsection (2) or unless the declaration provides for a lower percentage, the condominium form of ownership of the property may be terminated pursuant to a plan of termination approved by at least 80 percent of the total voting interests of the condominium. This subsection does not apply to condominiums in which 75 percent or more of the units are timeshare units.

(4) EXEMPTION.--A plan of termination is not an amendment subject to s. 718.110(4).

(5) MORTGAGE LIENHOLDERS.--Notwithstanding any provision to the contrary in the declaration or this chapter, approval of a plan of termination by the holder of a recorded mortgage lien affecting a condominium parcel in which fewer than 75 percent of the units are timeshare units is not required unless the plan of termination will result in less than the full satisfaction of the mortgage lien affecting the condominium parcel. If such approval is required and not given, a holder of a recorded mortgage lien who objects to the plan of termination may contest

the plan as provided in subsection (16). At the time of sale, the lien shall be transferred to the proportionate share of the proceeds assigned to the condominium parcel in the plan of termination or as subsequently modified by the court.

(6) POWERS IN CONNECTION WITH TERMINATION.--The approval of the plan of termination does not terminate the association. It shall continue in existence following approval of the plan of termination with all powers and duties it had before approval of the plan. Notwithstanding any provision to the contrary in the declaration or bylaws, after approval of the plan the board shall:

(a) Employ directors, agents, attorneys, and other professionals to liquidate or conclude its affairs.

(b) Conduct the affairs of the association as necessary for the liquidation or termination.

(c) Carry out contracts and collect, pay, and settle debts and claims for and against the association.

(d) Defend suits brought against the association.

(e) Sue in the name of the association for all sums due or owed to the association or to recover any of its property.

(f) Perform any act necessary to maintain, repair, or demolish unsafe or uninhabitable improvements or other condominium property in compliance with applicable codes.

(g) Sell at public or private sale or exchange, convey, or otherwise dispose of assets of the association for an amount deemed to be in the best interests of the association, and execute bills of sale and deeds of conveyance in the name of the association.

(h) Collect and receive rents, profits, accounts receivable, income, maintenance fees, special assessments, or insurance proceeds for the association.

(i) Contract and do anything in the name of the association which is proper or convenient to terminate the affairs of the association.

(7) NATURAL DISASTERS.--

(a) If, after a natural disaster, the identity of the directors or their right to hold office is in doubt, if they are deceased or unable to act, if they fail or refuse to act, or if they cannot be located, any interested person may petition the circuit court to determine the identity of the directors or, if found to be in the best interests of the unit owners, to appoint a receiver to conclude the affairs of the association after a hearing following notice to such persons as the court directs. Lienholders shall be given notice of the petition and have the right to propose persons for the consideration by the court as receiver.

(b) The receiver shall have all powers given to the board pursuant to the declaration, bylaws, and subsection (6), and any other powers that are necessary to conclude the affairs of the association and are set forth in the order of appointment. The appointment of the receiver is subject to the bonding requirements of such order. The order shall also provide for the payment of a reasonable fee to the receiver from the sources identified in the order, which may include rents, profits, incomes, maintenance fees, or special assessments collected from the condominium property.

(8) REPORTS AND REPLACEMENT OF RECEIVER.--

(a) The association, receiver, or termination trustee shall prepare reports each quarter following the approval of the plan of termination setting forth the status and progress of the termination, costs and fees incurred, the date the termination is expected to be completed, and the current financial condition of the association, receivership, or trusteeship and provide copies of the report by regular mail to the unit owners and lienors at the mailing address provided to the association by the unit owners and the lienors.

(b) The unit owners of an association in termination may recall or remove members of the board of administration with or without cause at any time as provided in s. 718.112(2)(j).

(c) The lienors of an association in termination representing at least 50 percent of the outstanding amount of liens may petition the court for the appointment of a termination trustee, which shall be granted upon good cause shown.

(9) PLAN OF TERMINATION.--The plan of termination must be a written document executed in the same manner as a deed by unit owners having the requisite percentage of voting interests to approve the plan and by the termination trustee. A copy of the proposed plan of termination shall be given to all unit owners, in the same manner as for notice of an annual meeting, at least 14 days prior to the meeting at which the plan of termination is to be voted upon or prior to or simultaneously with the distribution of the solicitation seeking execution of the plan of termination or written consent to or joinder in the plan. A

unit owner may document assent to the plan by executing the plan or by consent to or joinder in the plan in the manner of a deed. A plan of termination and the consents or joinders of unit owners and, if required, consents or joinders of mortgagees must be recorded in the public records of each county in which any portion of the condominium is located. The plan is effective only upon recordation or at a later date specified in the plan.

(10) PLAN OF TERMINATION; REQUIRED PROVISIONS.--The plan of termination must specify:

(a) The name, address, and powers of the termination trustee.

(b) A date after which the plan of termination is void if it has not been recorded.

(c) The interests of the respective unit owners in the association property, common surplus, and other assets of the association, which shall be the same as the respective interests of the unit owners in the common elements immediately before the termination, unless otherwise provided in the declaration.

(d) The interests of the respective unit owners in any proceeds from the sale of the condominium property. The plan of termination may apportion those proceeds pursuant to any method prescribed in subsection (12). If, pursuant to the plan of termination, condominium property or real property owned by the association is to be sold following termination, the plan must provide for the sale and may establish any minimum sale terms.

(e) Any interests of the respective unit owners in insurance proceeds or condemnation proceeds that are not used for repair or reconstruction at the time of termination. Unless

the declaration expressly addresses the distribution of insurance proceeds or condemnation proceeds, the plan of termination may apportion those proceeds pursuant to any method prescribed in subsection (12).

(11) PLAN OF TERMINATION; OPTIONAL PROVISIONS; CONDITIONAL TERMINATION.--

(a) The plan of termination may provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the plan must specify the conditions of possession.

(b) In a conditional termination, the plan must specify the conditions for termination. A conditional plan does not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed, confirming that the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests, have been recorded.

(12) ALLOCATION OF PROCEEDS OF SALE OF CONDOMINIUM PROPERTY.--

(a) Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan of termination must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair-market values immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee.

(b) The portion of proceeds allocated to the units shall

be further apportioned among the individual units. The apportionment is deemed fair and reasonable if it is so determined by the unit owners, who may approve the plan of termination by any of the following methods:

1. The respective values of the units based on the fair-market values of the units immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee;

2. The respective values of the units based on the most recent market value of the units before the termination, as provided in the county property appraiser's records; or

3. The respective interests of the units in the common elements specified in the declaration immediately before the termination.

(c) The methods of apportionment in paragraph (b) do not prohibit any other method of apportioning the proceeds of sale allocated to the units agreed upon in the plan of termination. The portion of the proceeds allocated to the common elements shall be apportioned among the units based upon their respective interests in the common elements as provided in the declaration.

(d) Liens that encumber a unit shall be transferred to the proceeds of sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in their same priority. The proceeds of any sale of condominium property pursuant to a plan of termination may not be deemed to be common surplus or association property.

(13) TERMINATION TRUSTEE.--The association shall serve as

termination trustee unless another person is appointed in the plan of termination. If the association is unable, unwilling, or fails to act as trustee, any unit owner may petition the court to appoint a trustee. Upon the date of the recording or at a later date specified in the plan, title to the condominium property vests in the trustee. Unless prohibited by the plan, the termination trustee shall be vested with the powers given to the board pursuant to the declaration, bylaws, and subsection (6). If the association is not the termination trustee, the trustee's powers shall be coextensive with those of the association to the extent not prohibited in the plan of termination or the order of appointment. If the association is not the termination trustee, the association shall transfer any association property to the trustee. If the association is dissolved, the trustee shall also have such other powers necessary to conclude the affairs of the association.

(14) TITLE VESTED IN TERMINATION TRUSTEE.--If termination is pursuant to a plan of termination under subsection (2) or subsection (3), the unit owners' rights and title as tenants in common in undivided interests in the condominium property vest in the termination trustee when the plan is recorded or at a later date specified in the plan. The unit owners thereafter become the beneficiaries of the proceeds realized from the plan of termination. The termination trustee may deal with the condominium property or any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee, on behalf of the unit owners, may contract for the sale of real property,

but the contract is not binding on the unit owners until the plan is approved pursuant to subsection (2) or subsection (3).

(15) NOTICE.--

(a) Within 30 days after a plan of termination has been recorded, the termination trustee shall deliver by certified mail, return receipt requested, notice to all unit owners, lienors of the condominium property, and lienors of all units at their last known addresses that a plan of termination has been recorded. The notice must include the book and page number of the public records in which the plan was recorded, notice that a copy of the plan shall be furnished upon written request, and notice that the unit owner or lienor has the right to contest the fairness of the plan.

(b) The trustee, within 90 days after the effective date of the plan, shall provide to the division a certified copy of the recorded plan, the date the plan was recorded, and the county, book, and page number of the public records in which the plan is recorded.

(16) RIGHT TO CONTEST.--A unit owner or lienor may contest a plan of termination by initiating a summary procedure pursuant to s. 51.011 within 90 days after the date the plan is recorded. A unit owner or lienor who does not contest the plan within the 90-day period is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property. In an action contesting a plan of termination, the person contesting the plan has the burden of pleading and proving that the apportionment of the proceeds from the sale among the unit

owners was not fair and reasonable. The apportionment of sale proceeds is presumed fair and reasonable if it was determined pursuant to the methods prescribed in subsection (12). The court shall determine the rights and interests of the parties and order the plan of termination to be implemented if it is fair and reasonable. If the court determines that the plan of termination is not fair and reasonable, the court may void the plan or may modify the plan to apportion the proceeds in a fair and reasonable manner pursuant to this section based upon the proceedings and order the modified plan of termination to be implemented. In such action, the prevailing party shall recover reasonable attorney's fees and costs.

(17) DISTRIBUTION.--

(a) Following termination of the condominium, the condominium property, association property, common surplus, and other assets of the association shall be held by the termination trustee, as trustee for unit owners and holders of liens on the units, in their order of priority.

(b) Not less than 30 days before the first distribution, the termination trustee shall deliver by certified mail, return receipt requested, a notice of the estimated distribution to all unit owners, lienors of the condominium property, and lienors of each unit at their last known addresses stating a good-faith estimate of the amount of the distributions to each class and the procedures and deadline for notifying the termination trustee of any objections to the amount. The deadline must be at least 15 days after the date the notice was mailed. The notice may be sent with or after the notice required by subsection

(15). If a unit owner or lienor files a timely objection with the termination trustee, the trustee need not distribute the funds and property allocated to the respective unit owner or lienor until the trustee has had a reasonable time to determine the validity of the adverse claim. In the alternative, the trustee may interplead the unit owner, lienor, and any other person claiming an interest in the unit and deposit the funds allocated to the unit in the court registry, at which time the condominium property, association property, common surplus, and other assets of the association are free of all claims and liens of the parties to the suit. In an interpleader action, the trustee and prevailing party may recover reasonable attorney's fees and costs and court costs.

(c) The proceeds from any sale of condominium property or association property and any remaining condominium property or association property, common surplus, and other assets shall be distributed in the following priority:

1. To pay the reasonable termination trustee's fees and costs and accounting fees and costs.

2. To lienholders of liens recorded prior to the recording of the declaration.

3. To purchase-money lienholders on units to the extent necessary to satisfy their liens.

4. To lienholders of liens of the association which have been consented to under s. 718.121(1).

5. To creditors of the association, as their interests appear.

6. To unit owners, the proceeds of any sale of condominium

property subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or lienor.

7. To unit owners, the remaining condominium property, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor as provided in paragraph (b).

8. To unit owners, the proceeds of any sale of association property, the remaining association property, common surplus, and other assets of the association, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor as provided in paragraph (b).

(d) After determining that all known debts and liabilities of an association in the process of termination have been paid or adequately provided for, the termination trustee shall distribute the remaining assets pursuant to the plan of termination. If the termination is by court proceeding or subject to court supervision, the distribution may not be made until any period for the presentation of claims ordered by the court has elapsed.

(e) Assets held by an association upon a valid condition requiring return, transfer, or conveyance, which condition has occurred or will occur, shall be returned, transferred, or conveyed in accordance with the condition. The remaining association assets shall be distributed pursuant to paragraph (c).

(f) Distribution may be made in money, property, or securities and in installments or as a lump sum, if it can be done fairly and ratably and in conformity with the plan of termination. Distribution shall be made as soon as is reasonably consistent with the beneficial liquidation of the assets.

(18) ASSOCIATION STATUS.--The termination of a condominium does not change the corporate status of the association that operated the condominium property. The association continues to exist to conclude its affairs, prosecute and defend actions by or against it, collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not to act except as necessary to conclude its affairs.

(19) CREATION OF ANOTHER CONDOMINIUM.--The termination of a condominium does not bar the creation by the termination trustee of another condominium affecting any portion of the same property.

(20) EXCLUSION.--This section does not apply to the termination of a condominium incident to a merger of that condominium with one or more other condominiums under s. 718.110(7).

Section 2. This act shall take effect July 1, 2007.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 433 Community Associations
SPONSOR(S): Domino; Anderson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 902; HB 1365; HB 1373

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Courts		Blalock AFB	Bond MB
2) Safety & Security Council			
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located. A declaration of condominium may be amended as provided in the declaration.

This bill amends condominium law to provide that in certain situations condominium associations will not be required to receive joinder or consent from mortgagees before amending their governing documents. This bill also revises condominium association powers and provides that leaseholds and other possesory and use interests can only be acquired by means provided in the declaration of condominium or by approval of 3/4 of the voting interest instead of 2/3 of the voting interest provided in current law.

A homeowners' association is a corporation responsible for the operation of a community in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments for violations of the governing documents. This bill increases the regulation of homeowners' associations and establishes conformity in the laws regulating homeowners' associations and condominium associations by:

- Revising the requirements for the inspection and copying of records;
- Revising what must be included in the associations' annual budget, and providing that the annual budget may include reserve accounts and how they are to be funded;
- Revising the financial reporting requirements;
- Clarifying rights and privileges of parcel owners regarding homeowners' association decisions about structures and parcel improvements; and
- Providing for guarantees of common expenses when specifically included in the declaration.

This bill also eliminates mediation of disputes between homeowners' associations and members from the jurisdiction of the Department of Business of Professional Regulation. The mandatory mediation of such disputes will have to be conducted by private mediators.

This bill appears to have a minimal negative fiscal impact on state revenues. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill eliminates the current requirement that certain disputes between homeowners and homeowners associations be referred to the Department of Business and Professional Regulation for assignment of a mediator.

Safeguard Individual Liberty -- This bill decreases restrictions on condominium associations when amending declarations of condominium, articles of incorporation, or bylaws. This bill increases regulation of homeowners' associations.

B. EFFECT OF PROPOSED CHANGES:

Background

A condominium is a "form of ownership of real property created pursuant to ch. 718, F.S., which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements".[1] A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.[2] A declaration is like a constitution in that it:

> strictly governs the relationships among condominium units owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.[3]

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.[4] A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of two-thirds of the units.[5]

Homeowners' association means a Florida corporation responsible for the operation of a subdivision in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.[6] Homeowners' associations are regulated under chapter 720, F.S.

Effect of Bill

Covenant Revitalization

Current Law

The governing documents in some Florida homeowners' associations provide for an expiration of the community covenants after a specified number of years. The Marketable Record Title Act, s. 712.05, F.S., will cause covenants to lapse by operation of law either where the covenants are silent as to expiration, or where the Marketable Record Title Act period is shorter than the stated expiration time.

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[1] Section 718.103(11), F.S.
[2] Section 718.104(2), F.S.
[3] *Neuman v. Grand View at Emerald Hills*, 861 So.2d 494, 496-497 (Fla. 4th DCA 2003)
[4] Section 718.104(5), F.S.
[5] Section 718.110(1)(a), F.S.
[6] Section 720.301(9), F.S.

Residents in these communities have the option to revive the covenants after the expiration by following the procedural steps found in ss. 720.403 - 720.407, F.S. Currently, the covenant revitalization procedures contained in ss. 720.403 - 720.407, F.S., are not available to any mandatory homeowners' association not governed by ch. 720, F.S. Chapter 720, F.S., governs only residential homeowners' associations where membership is a mandatory condition for the owners of property upon which assessments are required and may become a lien on the parcel,[7] thus, non-mandatory associations may not revive covenants pursuant to ss. 702.403 - 702.407, F.S.

Proposed Changes

This bill creates s. 712.11, F.S., to provide that a homeowner's association that is not subject to ch. 720, F.S. may use the procedures established in ss. 720.403, F.S. - 720.407, F.S., to revive covenants that have lapsed under the terms of chapter 712, F.S. This bill would allow homeowners' associations that are not regulated by ch. 720, F.S., to utilize the covenant revitalization procedures available to mandatory homeowners' associations.

Allowing Public Access to Beaches Adjacent to Condominiums

Proposed Changes

This bill creates s. 718.106(5), F.S., to restrict local governments from establishing a local ordinance that forbids a unit owner, an association's guests, licensees, members or invitees to use or access their units or common elements for the purpose of accessing a public beach or private beach adjacent to the condominium.

Mortgagee Consent or Joinder of Amendments to Declaration of Condominium

Current Law

Section 718.110(11), F.S., provides that any declaration of condominium recorded after April 1, 1992, may not require the consent or joinder of mortgagees in order for an association to pass an amendment to the declaration. This is limited to amendments which do not materially affect the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. Current law provides that such consent may not be unreasonably withheld. In the event mortgagee consent is provided other than by properly recorded joinder, such consent must be evidenced by affidavit of the association recorded in the public records of the county where the declaration is recorded.[8]

Proposed Changes

The bill provides findings by the Legislature that consent or joinder to amendments that do not materially affect the rights or interests of mortgagees is unreasonable and is a substantial burden on the condominium owners and association. This bill also provides that there is a compelling state interest in enabling condominium association members to approve amendments.

The bill limits the enforceability of certain provisions in or amendments to declarations, articles of incorporation or bylaws that require the consent or joinder of some or all mortgagees of units or any other portion of the condominium property for those mortgages recorded on or after October 1, 2006. Such provisions or amendments recorded prior to October 1, 2006, remain enforceable. The bill provides a process for obtaining addresses of mortgagees and contacting them to obtain their consent or joinder.

[7] Section 720.301(8) and (11), F.S.
[8] Section 718.110(11), F.S.

Failure of any mortgagee to respond to a request for the consent or joinder to a proposed amendment within 60 days after the date that a request is sent to the mortgagee is deemed to have consented to the amendment. The bill also limits the ability of certain mortgagees to void amendments.

Condominium Association's Powers

Current Law

Section 718.114, F.S., provides for the powers of a condominium association. Among other powers, an association has the authority to enter into agreements and acquire leaseholds, memberships, and other possesory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. All leaseholds, memberships, and other possesory or use interests existing or created at the time the declaration was recorded must be stated and fully described in the declaration. Following the recording of the declaration, the association may not acquire or enter into agreements acquiring these leaseholds, memberships, or other possesory or use interests except as authorized by the declaration. If the declaration does not provide this authority, then the declaration can be amended if the amendment is approved by the owners of not less than 2/3 of the units[9].

Proposed Changes

This bill defines that a material alteration or substantial addition to the association's real property includes any agreements acquiring leaseholds, memberships, or other possessory or use interests entered into 12 months following the recording of the declaration. A material alteration or substantial addition to the association's real property requires approval by 75% of the voting interest. Therefore, this bill increases the percentage for approval from 2/3 of the voting interest to 3/4 of the voting interest.

Mixed-Use Condominiums

Current Law

Section 718.404, F.S, pertains to mixed-use condominiums, which are condominiums where there are both residential and commercial units. Section 718.404(1), F.S., provides that for mixed-use condominiums, the owner of a commercial unit does not have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association. Section 718.404(2), F.S., is also amended to provide that when the number of residential units is equal to or greater than 50% of the total number of units operated by the association, owners of the residential units are entitled to vote for a majority of the seats on the board of administration.

Proposed Changes

This bill amends subsections (1) and (2) of s. 718.404, F.S., to provide that these subsections are intended to be applied retroactively as a remedial measure.

Equity Facilities Club

The bill creates a definition of "equity facilities club" applicable to ch. 719 (Cooperatives), to mean:

A club comprised of recreational facilities in which proprietary membership interests are sold to individuals, which membership interests entitle the individuals to use certain physical facilities owned by the equity club. Such physical facilities do not include a residential unit or accommodation. For purposes of this definition, the term "accommodation" shall include, but is not limited to, any apartment, residential cooperative unit, residential condominium unit, cabin, lodge, hotel or motel room, or any other accommodation designed for overnight occupancy for one or more individuals.

[9] Section 718.110(1)(a), F.S.

The bill also amends s. 719.507, F.S., to extend current limitations related to zoning and building laws, ordinances and regulations concerning cooperatives, to include equity facilities club form of ownership.

Scope of Ch. 720, F.S., Pertaining to Homeowners Associations

Current Law

Current law regulates homeowner associations in ch. 720, F.S., and s. 720.302, F.S., provides that ch. 720, F.S. does not apply to condominium associations. This bill amends s. 720.302, F.S., to provide an exception to the current law providing that chapter 720, which regulates homeowners' associations, does not apply to condominium associations.

Proposed Changes

This bill amends s. 720.302(4), F.S. to provide that ch. 720, F.S. does not apply to any association regulated under chapters 718 (condominiums), 719 (cooperatives), 721 (timeshares), or 723 (mobile home parks), except to the extent that a provision of ch. 718, 719, or 721, F.S. is expressly incorporated into ch. 720, F.S. for the purpose of regulating homeowners' associations.

This bill amends s. 720.302(5), F.S., to remove the phrase "not for profit" to conform to the other changes in this section. This bill also amends s. 720.302(5), F.S., to provide that corporations operating residential homeowners' associations in Florida are to be governed by and subject to ch. 607, F.S. (corporations), if the association was incorporated under the provisions of that chapter, or to ch. 617, F.S. (not for profit corporations), if the association was incorporated under the provisions of that chapter.

Homeowners' Association Board Meetings

Current Law

Section 720.303(2), F.S., provides procedures for association board meetings. A meeting of the board occurs whenever a quorum of the board gathers to conduct association business. Board meetings are open to all members, except for those meetings between the board and its attorney relating to proposed or pending litigation. Members also have the right to attend all board meetings and speak on any matter on the agenda for at least 3 minutes.

Notice of a board meeting must be posted in a conspicuous place in the community at least 48 hours prior to a meeting, except in an emergency. If notice of the board meeting is not posted in a conspicuous place, then notice of the board meeting must be mailed or delivered to each association member at least 7 days prior to the meeting, except in an emergency. For associations that have more than 100 members, the bylaws may provide for a reasonable alternative to this posting or mailing requirement. These alternatives include publication of notice, provision of a schedule of board meetings, conspicuous posting and repeated broadcasting of a notice in a certain format on a closed-circuit cable television system serving the association, or electronic transmission if the member consents in writing to such transmission.[10]

A board may not levy assessments at a meeting unless the notice of the meeting includes the nature of those assessments and a statement that the assessments will be considered at the meeting.[11]

Directors may not vote by proxy or by secret ballot at board meetings, except that secret ballots may be used in the election of officers. This also applies to meetings of any committee or similar body when a

[10] Section 720.303(2)(c)1, F.S.
[11] Section 720.303(2)(c)2, F.S.

final decision will be made regarding the spending of association funds. Proxy voting or secret ballots are also not allowed when a final decision will be made on approving or disapproving architectural decisions with respect to a specific parcel of residential property owned by a member of the community.[12]

Proposed Changes

This bill amends s. 720.303(2)(a), F.S., as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida,[13] to provide that provisions of this subsection which requires open meetings also apply to the meetings of any committee or other similar body when a final decision is made regarding the spending of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

This bill also repeals s. 720.303(2), F.S., as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, to remove conflicting versions of this subsection.

Homeowners' Association Inspection and Copying of Records

Current Law

Section 720.303(5), F.S., requires that a homeowners' association allow its members to inspect and copy its official records within 10 days of a written request for access. A failure to comply with such a request in a timely fashion creates a rebuttable presumption that the association failed to do so, and entitles the requesting party to actual damages, or to a minimum of $150 per calendar day, commencing on the eleventh business day. A homeowners' association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections but may not impose a requirement that a parcel owner demonstrate any proper purpose for the inspection, state any reason for the inspection, or limit a parcel owner's right to inspect records less than one 8-hour business day per month. The association may impose fees to cover the costs of providing copies of the official records, including without limitation, the costs of copying. The association may charge up to 50 cents per page for copies made on the association's copy machine. If the association does not have a copy machine available where the records are kept, or if the records requested to be copied exceed 25 pages, then the association may have copies made by an outside vendor and may charge the actual cost of copying.

Current law expressly exempts the following from inspection by a member or parcel owner: any record protected by attorney-client or work-product privilege; information obtained in association with the lease, sale or transfer of a parcel that is otherwise privileged by state or federal law; disciplinary, health, insurance and personnel records of the association's employees; or medical records of parcel owners or other community residents.[14]

Proposed Changes

This bill amends s. 720.303(5), F.S., to provide that an association or its agent is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association unless required by this chapter to be made available or disclosed. This bill also provides that an association or agent may charge a reasonable fee to a prospective purchaser or lienholder or

[12] Section 720.303(2)(c)3, F.S.

[13] In 2004 the Legislature passed SB 1184, which amended s. 720.303(2),F.S., in section 2 and section 18 of the bill. In 2004, the Legislature passed SB 2984, which also amended s. 720.303(2), F.S., in section 15 of the bill. This bill is amending s. 720.303(2), F.S., as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida, and is repealing s. 720.303(2), F.S., as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida.

[14] Section 720.303(1), (2), (3), (4), F.S.

the current parcel owner or member for providing good faith responses to requests for information, except for information required by law. The fee cannot exceed $50 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

Homeowners' Association Budgets

Current Law

Section 720.303(6), F.S., provides that an association must prepare an annual budget.

Proposed Changes

This bill amends s. 720.303(6), F.S., to require that:

- The annual budget provide for the annual operating expenses and the budget must be paid for by the association.
- The annual budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the association's governing documents do not limit increases in assessments.
- If the budget of the association does not provide for reserve accounts and the association is responsible for the repair and maintenance of capital improvements that may result in special assessments if reserves are not provided, each financial report for the preceding fiscal year must contain a statement in conspicuous type as provided by the bill.
- An association is deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. Once established, the reserve accounts must be funded, maintained or funding waived.
- The amount to be reserved must be computed by using a formula that is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item.
- Once a reserve account or reserve accounts are established, the membership of the association may provide for no reserves or less reserves.
- After the turnover, a developer may vote its voting interest to waive or reduce the funding of reserves.
- Reserve funds and any interest shall remain in the reserve account, and may be used only for authorized reserve expenditures.
- Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association may not vote to use reserves for purposes other than that for which they were intended without the approval of a majority of all non-developer voting interests.

Homeowners' Association Financial Reporting

Current Law

Section 720.303(7), F.S., requires homeowners' associations to prepare an annual financial report within 60 days after the close of the fiscal year. The association must provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member.

Proposed Changes

This bill amends s. 720.303(7), F.S., to increase from 60 to 90 days the time that an association has to prepare and complete an annual financial report after the close of the fiscal year. Within 21 days after the final financial report is completed by the association, but no later than 120 days after the end of the fiscal year, the association must provide each member with a copy of the annual financial report.

This bill amends s. 720.303(7)(a), F.S., to provide that financial statements are to be completed in accordance with the accounting principles adopted by the Florida Board of Accountancy.

Architectural Control Covenants and Parcel Owner Improvements

Proposed Changes

This bill creates s. 720.3035, F.S., to provide that:

- An association may review and approve plans and specifications for the location, size, type or appearance of any structure, or enforce such standards, only to the extent as specifically stated or reasonably inferred in the declaration of covenants.
- An association may only restrict the right of a parcel owner to select from options for the use of material, the size or design of the structure or improvement, or the location of the structure or improvement on the parcel as provided in the declaration of covenants.
- For the purpose of establishing setback lines specifically stated in the declaration of covenants, each parcel may be deemed to have only one front. When the declaration of covenants does not provide for specific setback lines, the applicable county or municipal setback lines shall apply.
- Each parcel owner is entitled to the rights and privileges provided in the declaration of covenants concerning the use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably impaired by the association.
- An association may not enforce any policy that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants, whether the policy is uniformly applied or not.

Attorney's Fees for Actions Between an Association and a Member

Current Law

Section 720.305, F.S., provides that an action to enforce the rules and provisions established by the homeowners' association can be brought by the association or by any member against the association, a member, any director of the association, and any tenants, guests, or invitees occupying a parcel or common area. This section also provides that the prevailing party in any litigation is entitled to recover reasonable attorney's fees and costs. A member that has successfully sued his or her association must, under current law, return a portion of those fees back to the association. Thus, under current law a member cannot be fully compensated for his or her attorney's fees.

Proposed Changes

This bill amends s. 720.305, F.S., to provide that any member who prevails against an association and is awarded attorney's fees may also be awarded an amount sufficient to cover the member's pro-rata portion of those fees.

Meetings of Association Members; Amendments

Current Law

Section 720.306(1)(c), F.S., provides that an amendment may not materially and adversely alter the proportionate voting interest attached to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association, unless all owners and lienholders join in the execution of the amendment. A change in quorum requirements is not an alteration of voting interests.

Proposed Changes

The bill amends s. 720.306(1)(c), F.S., adding the provision that the merger or consolidation of associations under ch. 607, F.S. (regulating corporations) or ch. 617, F.S. (regulating non-profit corporations), is not considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

Transition of Homeowners' Association Control

Current Law

Section 720.307, F.S., provides procedures for turning over control of an association from the developer to parcel owners. The transition of association control begins with the election of the board of directors of the homeowners' association by the members. At the time the members elect the board of directors, the developer must deliver various documents to the board.

Proposed Changes

This bill amends s. 720.307, F.S., to provide an additional document that the developer must provide to the board of directors. Along with the documents that must be provided by the developer under current law, the bill requires that the developer also provide the board of directors the financial records, including the statements of the association, and source documents from the incorporation of the association through the date of turnover. This bill also provides that an independent certified public accountant must audit the records and determine that the developer was charged with, and paid, the proper amounts of assessments.

The language in this section of the bill is taken from language found in s. 718.301(4)(c), F.S., of the Condominium Act. The current law for homeowners' associations pertaining to transition of association control is very similar to the current Condominium Act and this bill provides conformity between homeowners' associations and the condominium associations.

Guarantees of Common Expenses

Current Law

The developer of a community is responsible for paying the costs of the common expenses of the community until the sale of the parcels to a purchaser at which time the developer pays a proportionate share of the common expenses with the parcel owners. Condominium law allows a developer to be excused from payment of common expenses if the common expenses of all unit owners are guaranteed not to increase and the developer agrees to pay all common expenses incurred but not covered by unit owner payments during the period of the guarantee.[15]

Proposed Changes

This bill amends s. 720.308, F.S., to incorporate the guarantees of common expenses provision found in condominium law into homeowners' association law. Currently, s. 720.308, F.S., provides for guarantees of common expenses if it is provided for in the declaration. This bill amends s. 720.308, F.S., to provide for guarantees of common expenses if a guarantee is not included in the purchase contract or declaration. This bill provides that a guarantee is effective only upon approval of a majority of the voting interests of the members other than the developer. This bill also provides that:

- The time period of a guarantee must have a specific beginning and ending date or event;

[15] Section 718.116, F.S.

- The dollar amount of the guarantee must be an exact dollar amount for each parcel identified in the declaration;
- The cash payments required from the developer must be when the revenue collected by the association are not sufficient to provide payment for all common expenses; and
- The expenses incurred in the production of non-assessment revenues, not in excess of the non-assessment revenues, must not be included in the common expenses. If expenses attributable to non-assessment revenues exceed non-assessment revenues, then the developer must only fund the excess expenses.

Dispute Resolution

Current Law

Section 720.311, F.S., established dispute resolution procedures for homeowners' associations and their members. Current law requires that recall disputes must be resolved by binding arbitration conducted by the Department of Business and Professional Regulation (DBPR). Any recall dispute filed with the DBPR must be conducted in accordance with the provisions of ss. 718.1255 and 718.112(2)(j), F.S., which establish requirements and procedures for the removal of condominium directors and dispute resolution procedures for condominiums. Section 718.1255, F.S., requires that arbitration proceedings relating to the recall of a condominium director must be conducted pursuant to the arbitration procedures in s. 718.1255, F.S., and provides that, if the condominium association fails to comply with the final order of arbitration, the DBPR may take action pursuant to s. 718.501, F.S. Section 718.501, F.S., establishes the powers and duties of the DBPR, which include the power to conduct investigations, issue orders, conduct consent proceedings, bring actions in civil court on behalf of unit owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution, and to assess civil penalties.

Section 720.311(1), F.S., provides that the DBPR must conduct mandatory binding arbitration of election disputes in accordance with s. 718.1255, F.S. Election and recall disputes are not eligible for mediation. Current law requires a $200 filing fee and authorizes the DBPR to assess the parties an additional fee in an amount adequate to cover the DBPR's costs and expenses. The fee paid to the DBPR must be a recoverable cost in the arbitration proceeding, and the prevailing party must be paid its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. Section 720.311(1), F.S., provides that any petition for mediation or arbitration shall toll the applicable statute of limitations. The statute authorizes the DBPR to adopt rules to implement this section.

Section 720.311(2)(a), F.S., provides that the following disputes must be filed with the DBPR for mandatory mediation by the division before the dispute is filed in court:

- Disputes between an association and a parcel owner regarding use of, or changes to, the parcel or the common areas and other covenant enforcement disputes;
- Disputes regarding amendments to the association documents;
- Disputes regarding meetings of the board and committees appointed by the board;
- Disputes regarding membership meetings not including election meetings; and
- Disputes regarding access to the official records of the association.

The mediation is conducted under the applicable Florida Rules of Civil Procedure, and the proceeding is privileged and confidential to the same extent as court-ordered mediation. Current law provides that persons not a party to the suit may not attend the mediation conference without the consent of all the parties. Current law also requires a $200 fee to defray the costs of the mandatory mediation, authorizes the DBPR to charge additional fees to cover the costs of the mandatory mediation, and requires that the parties share the costs of mediation equally, unless the parties agree otherwise. If the mandatory mediation is not successful, the parties may file the dispute in a court or enter the dispute into binding or non-binding arbitration to be conducted by the DBPR or private arbitrator. Section

720.311(2)(d), F.S., provides that the mediation procedure may be used by non-mandatory homeowners' associations.

Section 720.311(2)(c), F.S., provides standards to DBPR certification and training of mediators and arbitrators and requires that DBPR-certified mediators must also be certified by the Florida Supreme Court.

Section 720.311(3), F.S., currently provides that the DBPR must develop an education program to assist homeowners, associations, board members, and managers in understanding the use of alternative dispute resolution techniques in resolving disputes between parcel owners and associations or between owners. Current law also provides that the certification program for arbitrators and mediators, and the education program for homeowners' associations and their members would be funded by moneys and filing fees generated by the arbitration and mediation proceedings.

Proposed Changes

This bill amends s. 720.311, F.S., to provide:

- That all references to mediation be changed to "presuit" mediation;
- That disputes subject to presuit mediation do not include the collection of any assessments, fines, or other financial obligations, including attorney's fees and costs, or any action to enforce a prior mediation settlement;
- That the presuit mediation requirements of s. 720.311, F.S., do not apply to any dispute where emergency relief is required;
- A form for the written offer to participate in presuit mediation titled "Statutory Offer to Participate in Presuit Mediation" that must be substantially followed by the aggrieved party and which is served on the responding party. The form provides that the party may waive presuit mediation so that this matter may proceed directly to court;
- That service of the statutory offer is effected by sending the statutory form, or a letter that conforms substantially to the statutory form, by certified mail, with an additional copy being sent via regular first-class mail, to the address of the responding party as it appears on the books and records of the association;
- That dispute resolution to resolve disputes between associations and a parcel owner is no longer within the jurisdiction of the Department of Business and Professional Regulation;
- That the responding party will have 20 days from the date the offer is mailed to serve a response in writing. The response is to be served by certified mail, with an additional copy being sent by regular first-class mail to the address shown on the offer;
- That the mediator may require advance payment of fees and costs. This bill removes the $200 filing fee requirement and other language providing for the fees for a DBPR mediator.
- That failure of either party to appear for mediation, respond to the offer, agree on a mediator, or pay the fees and costs will entitle the other party to seek an award of the costs and fees associated with mediation;
- That if presuit mediation cannot be conducted within 90 days after the offer to participate, then an impasse will be deemed unless both parties agree to extend the deadline;
- That any issue or dispute that is not resolved at presuit mediation, the prevailing party in any subsequent arbitration or litigation proceeding shall be entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process; and
- That DBPR is no longer responsible for certification programs for mediators or education programs for homeowners' associations.

C. SECTION DIRECTORY:

Section 1 creates s. 712.11, F.S., relating to covenant revitalization for mandatory homeowners associations.

Section 2 amends s. 718.106, F.S., relating to public beach access of condominium unit owners.

Section 3 amends s. 718.110, F.S., relating to amending a condominium's governing documents.

Section 4 amends s. 718.114, F.S., relating to the powers of a condominium association.

Section 5 amends s. 718.404, F.S., relating to mixed-use condominiums.

Section 6 amends s. 718.103, F.S., creating the definition of an "equity facility club".

Section 7 amends s. 719.507, F.S., relating to the application of certain building or zoning laws, ordinances, and regulations concerning condominiums.

Section 8 amends s. 720.302, F.S., relating to the purpose and scope of the laws regulating homeowners associations.

Section 9 amends s. 720.303, F.S., relating to the powers and duties of a homeowners association.

Section 10 repeals s. 720.303(2), F.S., as amended by s. 2, ch. 2004-345 L.O.F. and s. 15, ch. 2004-353, L.O.F.

Section 11 creates s. 720.3035, F.S., relating to architectural control covenants and parcel owner improvements.

Section 12 amends s. 720.305, F.S., relating to the costs of litigation between a member and an association.

Section 13 amends s. 720.306, F.S., relating to the merger or consolidation of one or more associations under ch. 607, F.S.

Section 14 amends s. 720.307, F.S., relating to the delivery of financial records by the developer to the members during the transition of association control.

Section 15 amends s. 720.308, F.S., relating to homeowners association guarantees of common expenses.

Section 16 amends s. 720.311, F.S., relating to dispute resolution between the members and the homeowners association.

Section 17 provides an effective date of July 1, 2007, except as otherwise expressly provided in this bill.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The Department of Business and Professional Regulation (DBPR) estimates that this bill will result in a reduction of $126,018 in mediation filing fees and expenses received by the DBPR. It will also result in a reduction of $9,199 in service charges provided to General Revenue.[16]

2. Expenditures:

[16] The fiscal impact on state government was provided by the Department of Business and Professional Regulation on April 3, 2006.

The Department of Business and Professional Regulation will experience decreased workload as a result of no longer being required to perform homeowner association mediations. The department states, however, that it did not receive additional FTE's to perform homeowners' association mediations when the DBPR was originally assigned those responsibilities in FY 2004-05. The staff who have been conducting homeowners' association mediations also performs condominium mediations and the DBPR states they would return to those responsibilities full-time.

According to the Legislative Analysis Form provided by DBPR, the bill's changes regarding mediation may result in increased court filings. During the roughly 12-month period from October 1, 2004 through November 22, 2005, the DBPR states that it received 1,007 petitions for mediation. Approximately 560 or 56% of these were settled and did not result in court filings.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."[17] "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."[18] [19]

The Supreme Court of Florida in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979) held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.[20] The *Pomponio* Court indicated that the "well-accepted principle in this state is that virtually no degree of contract impairment is tolerable in

[17] Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . . "

[18] 10a Fla. Jur. s. 414, Constitutional Law.

[19] The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

[20] The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

this state." *Pomponio*, 378 So. 2d at 780. When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy." *Id.*

There could be some possible Contract Clause issues with the changes made in this bill to subsections (1) and (2) of s. 718.404, F.S. This bill amends this section to make these subsections apply retroactively. This could lead to contract clause violations if it were found to impair existing contracts.

B. RULE-MAKING AUTHORITY:

None. However, the bill may require the repeal of Ch. 61B-82, F.A.C., containing the mediation rules of procedure.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

This bill is substantially similar to HB 391 passed unanimously during the 2006 legislative session. While HB 391 was ultimately vetoed by the Governor, the adverse provisions have been removed or revised.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

N/A

A bill to be entitled

An act relating to community associations; creating s. 712.11, F.S.; providing for the revival of certain covenants that have lapsed; amending s. 718.106, F.S.; prohibiting local governments from limiting the access of certain persons to beaches adjacent to or adjoining condominium property; amending s. 718.110, F.S.; revising provisions relating to the amendment of declarations; providing legislative findings and a finding of compelling state interest; providing criteria for consent to an amendment; requiring notice regarding proposed amendments to mortgagees; providing criteria for notification; providing for voiding certain amendments; amending s. 718.114, F.S.; providing that certain leaseholds, memberships, or other possessory or use interests shall be considered a material alteration or substantial addition to certain real property; amending s. 718.404, F.S.; providing retroactive application of provisions relating to mixed-use condominiums; amending s. 719.103, F.S.; providing a definition; amending s. 719.507, F.S.; prohibiting laws, ordinances, or regulations that apply only to improvements that are or may be subjected to an equity club form of ownership; amending s. 720.302, F.S.; revising governing provisions relating to corporations that operate residential homeowners' associations; amending s. 720.303, F.S.; revising application to include certain meetings; requiring the association to provide certain information to prospective purchasers or

lienholders; authorizing the association to charge a reasonable fee for providing certain information; requiring the budget to provide for annual operating expenses; authorizing the budget to include reserve accounts for capital expenditures and deferred maintenance; providing a formula for calculating the amount to be reserved; authorizing the association to adjust replacement reserve assessments annually; authorizing the developer to vote to waive the reserves or reduce the funding of reserves for a certain period; revising provisions relating to financial reporting; revising time periods in which the association must complete its reporting; repealing s. 720.303(2), F.S., as amended, relating to board meetings, to remove conflicting versions of that subsection; creating s. 720.3035, F.S.; providing for architectural control covenants and parcel owner improvements; authorizing the review and approval of plans and specifications; providing limitations; providing rights and privileges for parcel owners as set forth in the declaration of covenants; amending s. 720.305, F.S.; providing that, where a member is entitled to collect attorney's fees against the association, the member may also recover additional amounts as determined by the court; amending s. 720.306, F.S.; providing that certain mergers or consolidations of an association shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel; amending s. 720.307, F.S.; requiring developers to deliver

financial records to the board in any transition of association control to members; requiring certain information to be included in the records and for the records to be prepared in a specified manner; amending s. 720.308, F.S.; providing circumstances under which a guarantee of common expenses shall be effective; providing for approval of the guarantee by association members; providing for a guarantee period and extension thereof; requiring the stated dollar amount of the guarantee to be an exact dollar amount for each parcel identified in the declaration; providing payments required from the guarantor to be determined in a certain manner; providing a formula to determine the guarantor's total financial obligation to the association; providing that certain expenses incurred in the production of certain revenues shall not be included in the operating expenses; amending s. 720.311, F.S.; revising provisions relating to dispute resolution; providing that the filing of any petition for arbitration or the serving of an offer for presuit mediation shall toll the applicable statute of limitations; providing that certain disputes between an association and a parcel owner shall be subject to presuit mediation; revising provisions to conform; providing that temporary injunctive relief may be sought in certain disputes subject to presuit mediation; authorizing the court to refer the parties to mediation under certain circumstances; requiring the aggrieved party to serve on the responding party a written offer to participate in

presuit mediation; providing a form for such offer; providing that service of the offer is effected by the sending of such an offer in a certain manner; providing that the prevailing party in any subsequent arbitration or litigation proceedings is entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process; requiring the mediator or arbitrator to meet certain certification requirements; removing a requirement relating to development of an education program to increase awareness of the operation of homeowners' associations and the use of alternative dispute resolution techniques; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 712.11, Florida Statutes, is created to read:

712.11 Covenant revitalization.--A homeowners' association not otherwise subject to chapter 720 may use the procedures set forth in ss. 720.403-720.407 to revive covenants that have lapsed under the terms of this chapter.

Section 2. Subsection (5) is added to section 718.106, Florida Statutes, to read:

718.106 Condominium parcels; appurtenances; possession and enjoyment.--

(5) A local government may not prohibit condominium unit owners or an association from permitting guests, licensees, or invitees access to a public beach adjacent to or adjoining the

condominium property.

Section 3. Effective October 1, 2007, subsection (11) of section 718.110, Florida Statutes, is amended to read:

718.110 Amendment of declaration; correction of error or omission in declaration by circuit court.--

(11) The Legislature finds that the procurement of mortgagee consent to amendments that do not affect the rights or interests of mortgagees is an unreasonable and substantial logistical and financial burden on the unit owners and that there is a compelling state interest in enabling the members of a condominium association to approve amendments to the condominium documents through legal means. Accordingly, and notwithstanding any provision to the contrary contained in this section:

(a) As to any mortgage recorded on or after October 1, 2007, any provision in the declaration, articles of incorporation, or bylaws that requires ~~recorded after April 1, 1992, may not require~~ the consent or joinder of some or all mortgagees of units or any other portion of the condominium property to or in amendments to the declaration, articles of incorporation, or bylaws or for any other matter shall be enforceable only as to the following matters: ~~unless the requirement is limited to amendments materially affecting the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, and unless the requirement provides that such consent may not be unreasonably withheld. It shall be presumed that, except as to~~

1. Those matters described in subsections (4) and (8).~~.~~

2. Amendments to the declaration, articles of incorporation, or bylaws that adversely affect the priority of the mortgagee's lien or the mortgagee's rights to foreclose its lien or that otherwise materially affect the rights and interests of the mortgagees.

(b) As to mortgages recorded before October 1, 2007, any existing provisions in the declaration, articles of incorporation, or bylaws requiring mortgagee consent shall be enforceable.

(c) In securing consent or joinder, the association shall be entitled to rely upon the public records to identify the holders of outstanding mortgages. The association may use the address provided in the original recorded mortgage document, unless there is a different address for the holder of the mortgage in a recorded assignment or modification of the mortgage, which recorded assignment or modification must reference the official records book and page on which the original mortgage was recorded. Once the association has identified the recorded mortgages of record, the association shall, in writing, request of each unit owner whose unit is encumbered by a mortgage of record any information the owner has in his or her possession regarding the name and address of the person to whom mortgage payments are currently being made. Notice shall be sent to such person if the address provided in the original recorded mortgage document is different from the name and address of the mortgagee or assignee of the mortgage as shown by the public record. The association shall be deemed to

have complied with this requirement by making the written request of the unit owners required under this paragraph. Any notices required to be sent to the mortgagees under this paragraph shall be sent to all available addresses provided to the association.

(d) Any notice to the mortgagees required under paragraph (c) may be sent by a method that establishes proof of delivery, and any mortgagee who fails to respond within 60 days after the date of mailing shall be deemed to have consented to the amendment.

(e) For those amendments requiring mortgagee consent on or after October 1, 2007, ~~do not materially affect the rights or interests of mortgagees.~~ in the event mortgagee consent is provided other than by properly recorded joinder, such consent shall be evidenced by affidavit of the association recorded in the public records of the county where the declaration is recorded. Any amendment adopted without the required consent of a mortgagee shall be voidable only by a mortgagee who was entitled to notice and an opportunity to consent. An action to void an amendment shall be subject to the statute of limitations beginning 5 years from the date of discovery as to the amendments described in subparagraphs (a)1. and 2. and 5 years from the date of recordation of the certificate of amendment for all other amendments. This provision shall apply to all mortgages, regardless of the date of recordation of the mortgage.

Section 4. Section 718.114, Florida Statutes, is amended to read:

718.114 Association powers.--An association has the power to enter into agreements, to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. It has this power whether or not the lands or facilities are contiguous to the lands of the condominium, if they are intended to provide enjoyment, recreation, or other use or benefit to the unit owners. All of these leaseholds, memberships, and other possessory or use interests existing or created at the time of recording the declaration must be stated and fully described in the declaration. Subsequent to the recording of the declaration, agreements acquiring these leaseholds, memberships, or other possessory or use interests not entered into within 12 months following the recording of the declaration shall be considered a material alteration or substantial addition to the real property that is association property, and the association may not acquire or enter into agreements acquiring these leaseholds, memberships, or other possessory or use interests except as authorized by the declaration as provided in s. 718.113. The declaration may provide that the rental, membership fees, operations, replacements, and other expenses are common expenses and may impose covenants and restrictions concerning their use and may contain other provisions not inconsistent with this chapter. A condominium association may conduct bingo games as provided in s. 849.0931.

Section 5. Subsections (1) and (2) of section 718.404, Florida Statutes, are amended to read:

718.404 Mixed-use condominiums.--When a condominium consists of both residential and commercial units, the following provisions shall apply:

(1) The condominium documents shall not provide that the owner of any commercial unit shall have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association. This subsection shall apply retroactively as a remedial measure.

(2) Subject to s. 718.301, where the number of residential units in the condominium equals or exceeds 50 percent of the total units operated by the association, owners of the residential units shall be entitled to vote for a majority of the seats on the board of administration. This subsection shall apply retroactively as a remedial measure.

Section 6. Subsections (18) through (27) of section 719.103, Florida Statutes, are renumbered as subsections (19) through (28), respectively, and a new subsection (18) is added to that section to read:

719.103 Definitions.--As used in this chapter:

(18) "Equity facilities club" means a club comprised of recreational facilities in which proprietary membership interests are sold to individuals, which membership interests entitle the individuals to use certain physical facilities owned by the equity club. Such physical facilities do not include a residential unit or accommodation. For purposes of this definition, the term "accommodation" shall include, but is not limited to, any apartment, residential cooperative unit, residential condominium unit, cabin, lodge, hotel or motel room,

or any other accommodation designed for overnight occupancy for one or more individuals.

Section 7. Section 719.507, Florida Statutes, is amended to read:

719.507 Zoning and building laws, ordinances, and regulations.--All laws, ordinances, and regulations concerning buildings or zoning shall be construed and applied with reference to the nature and use of such property, without regard to the form of ownership. No law, ordinance, or regulation shall establish any requirement concerning the use, location, placement, or construction of buildings or other improvements which are, or may thereafter be, subjected to the cooperative or equity facilities club form of ownership, unless such requirement shall be equally applicable to all buildings and improvements of the same kind not then, or thereafter to be, subjected to the cooperative or equity facilities club form of ownership. This section does not apply if the owner in fee of any land enters into and records a covenant that existing improvements or improvements to be constructed shall not be converted to the cooperative form of residential ownership prior to 5 years after the later of the date of the covenant or completion date of the improvements. Such covenant shall be entered into with the governing body of the municipality in which the land is located or, if the land is not located in a municipality, with the governing body of the county in which the land is located.

Section 8. Subsections (4) and (5) of section 720.302, Florida Statutes, are amended to read:

720.302 Purposes, scope, and application.--

(4) This chapter does not apply to any association that is subject to regulation under chapter 718, chapter 719, or chapter 721~~,~~ or to any nonmandatory association formed under chapter 723, except to the extent that a provision of chapter 718, chapter 719, or chapter 721 is expressly incorporated into this chapter for the purpose of regulating homeowners' associations.

(5) Unless expressly stated to the contrary, corporations ~~not for profit~~ that operate residential homeowners' associations in this state shall be governed by and subject to chapter 607, if the association was incorporated under that chapter, or to chapter 617, if the association was incorporated under that chapter, and this chapter. This subsection is intended to clarify existing law.

Section 9. Paragraph (a) of subsection (2), subsection (6), and subsection (7) of section 720.303, Florida Statutes, as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida, are amended, and paragraph (d) is added to subsection (5) of that section, to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.--

(2) BOARD MEETINGS.--

(a) A meeting of the board of directors of an association occurs whenever a quorum of the board gathers to conduct association business. All meetings of the board must be open to all members except for meetings between the board and its attorney with respect to proposed or pending litigation where

the contents of the discussion would otherwise be governed by the attorney-client privilege. The provisions of this subsection shall also apply to the meetings of any committee or other similar body when a final decision will be made regarding the expenditure of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

(5) INSPECTION AND COPYING OF RECORDS.--The official records shall be maintained within the state and must be open to inspection and available for photocopying by members or their authorized agents at reasonable times and places within 10 business days after receipt of a written request for access. This subsection may be complied with by having a copy of the official records available for inspection or copying in the community. If the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages.

(d) The association or its authorized agent is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association other than information or documents required by this chapter to be made available or disclosed. The association or its authorized agent may charge a reasonable fee to the prospective purchaser or lienholder or the current parcel owner or member for providing good faith responses to requests for information by or on behalf of a prospective purchaser or lienholder, other

than that required by law, if the fee does not exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

(6) BUDGETS.--

(a) The association shall prepare an annual budget that sets out the annual operating expenses. The budget must reflect the estimated revenues and expenses for that year and the estimated surplus or deficit as of the end of the current year. The budget must set out separately all fees or charges paid for by the association for recreational amenities, whether owned by the association, the developer, or another person. The association shall provide each member with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member. The copy must be provided to the member within the time limits set forth in subsection (5).

(b) In addition to annual operating expenses, the budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the governing documents do not limit increases in assessments, including reserves. If the budget of the association includes reserve accounts, such reserves shall be determined, maintained, and waived in the manner provided in this subsection. Once an association provides for reserve accounts in the budget, the association shall thereafter determine, maintain, and waive reserves in compliance with the provisions of this subsection.

(c) If the budget of the association does not provide for

reserve accounts governed by this subsection and the association is responsible for the repair and maintenance of capital improvements that may result in a special assessment if reserves are not provided, each financial report for the preceding fiscal year required by subsection (7) shall contain the following statement in conspicuous type: THE BUDGET OF THE ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL ASSESSMENTS. OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO THE PROVISIONS OF SECTION 720.303(6), FLORIDA STATUTES, UPON THE APPROVAL OF NOT LESS THAN A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE ASSOCIATION.

(d) An association shall be deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. If reserve accounts are not initially provided for by the developer, the membership of the association may elect to do so upon the affirmative approval of not less than a majority of the total voting interests of the association. Such approval may be attained by vote of the members at a duly called meeting of the membership or upon a written consent executed by not less than a majority of the total voting interests in the community. The approval action of the membership shall state that reserve accounts shall be provided for in the budget and designate the components for which the reserve accounts are to be established. Upon approval by the membership, the board of directors shall provide for the required reserve accounts for inclusion in the

budget in the next fiscal year following the approval and in each year thereafter. Once established as provided in this subsection, the reserve accounts shall be funded or maintained or shall have their funding waived in the manner provided in paragraph (f).

(e) The amount to be reserved in any account established shall be computed by means of a formula that is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. The association may adjust replacement reserve assessments annually to take into account any changes in estimates of cost or useful life of a reserve item.

(f) Once a reserve account or reserve accounts are established, the membership of the association, upon a majority vote at a meeting at which a quorum is present, may provide for no reserves or less reserves than required by this section. If a meeting of the unit owners has been called to determine whether to waive or reduce the funding of reserves and no such result is achieved or a quorum is not present, the reserves as included in the budget shall go into effect. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves. Any vote taken pursuant to this subsection to waive or reduce reserves shall be applicable only to one budget year.

(g) Funding formulas for reserves authorized by this section shall be based on either a separate analysis of each of the required assets or a pooled analysis of two or more of the required assets.

1. If the association maintains separate reserve accounts for each of the required assets, the amount of the contribution to each reserve account shall be the sum of the following two calculations:

a. The total amount necessary, if any, to bring a negative component balance to zero.

b. The total estimated deferred maintenance expense or estimated replacement cost of the reserve component less the estimated balance of the reserve component as of the beginning of the period for which the budget will be in effect. The remainder, if greater than zero, shall be divided by the estimated remaining useful life of the component.

The formula may be adjusted each year for changes in estimates and deferred maintenance performed during the year and may include factors such as inflation and earnings on invested funds.

2. If the association maintains a pooled account of two or more of the required reserve assets, the amount of the contribution to the pooled reserve account as disclosed on the proposed budget shall not be less than that required to ensure that the balance on hand at the beginning of the period for which the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful life of all of the assets that make up the reserve pool are equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all of the assets that make up the reserve pool, based on the current reserve analysis. The

projected annual cash inflows may include estimated earnings from investment of principal. The reserve funding formula shall not include any type of balloon payments.

(h) Reserve funds and any interest accruing thereon shall remain in the reserve account or accounts and shall be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a meeting at which a quorum is present. Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association shall not vote to use reserves for purposes other than those for which they were intended without the approval of a majority of all nondeveloper voting interests voting in person or by limited proxy at a duly called meeting of the association.

(7) FINANCIAL REPORTING.--Within 90 days after the end of the fiscal year, or annually on the date provided in the bylaws, the association shall prepare and complete, or contract with a third party for the preparation and completion of, a financial report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall ~~prepare an annual financial report within 60 days after the close of the fiscal year. The association shall~~, within the time limits set forth in subsection (5), provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the

member. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare or cause to be prepared a complete set of financial statements in accordance with generally accepted accounting principles as adopted by the Board of Accountancy. The financial statements shall be based upon the association's total annual revenues, as follows:

1. An association with total annual revenues of $100,000 or more, but less than $200,000, shall prepare compiled financial statements.

2. An association with total annual revenues of at least $200,000, but less than $400,000, shall prepare reviewed financial statements.

3. An association with total annual revenues of $400,000 or more shall prepare audited financial statements.

(b)1. An association with total annual revenues of less than $100,000 shall prepare a report of cash receipts and expenditures.

2. An association in a community of fewer than 50 parcels, regardless of the association's annual revenues, may prepare a report of cash receipts and expenditures in lieu of financial statements required by paragraph (a) unless the governing documents provide otherwise.

3. A report of cash receipts and disbursement must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including, but not limited to, the following, as applicable: costs for security, professional, and

management fees and expenses; taxes; costs for recreation facilities; expenses for refuse collection and utility services; expenses for lawn care; costs for building maintenance and repair; insurance costs; administration and salary expenses; and reserves if maintained by the association.

(c) If 20 percent of the parcel owners petition the board for a level of financial reporting higher than that required by this section, the association shall duly notice and hold a meeting of members within 30 days of receipt of the petition for the purpose of voting on raising the level of reporting for that fiscal year. Upon approval of a majority of the total voting interests of the parcel owners, the association shall prepare or cause to be prepared, shall amend the budget or adopt a special assessment to pay for the financial report regardless of any provision to the contrary in the governing documents, and shall provide within 90 days of the meeting or the end of the fiscal year, whichever occurs later:

1. Compiled, reviewed, or audited financial statements, if the association is otherwise required to prepare a report of cash receipts and expenditures;

2. Reviewed or audited financial statements, if the association is otherwise required to prepare compiled financial statements; or

3. Audited financial statements if the association is otherwise required to prepare reviewed financial statements.

(d) If approved by a majority of the voting interests present at a properly called meeting of the association, an association may prepare or cause to be prepared:

1. A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;

2. A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or

3. A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

Section 10. Subsection (2) of section 720.303, Florida Statutes, as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, is repealed.

Section 11. Section 720.3035, Florida Statutes, is created to read:

720.3035 Architectural control covenants; parcel owner improvements; rights and privileges.--

(1) The authority of an association or any architectural, construction improvement, or other such similar committee of an association to review and approve plans and specifications for the location, size, type, or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement located on a parcel, shall only be permitted to the extent that the authority is specifically stated or reasonably inferred as to such location, size, type, or appearance in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(2) If the declaration of covenants or other published guidelines and standards authorized by the declaration of

covenants provides options for the use of material, the size of the structure or improvement, the design of the structure or improvement, or the location of the structure or improvement on the parcel, neither the association nor any architectural, construction improvement, or other such similar committee of the association shall restrict the right of a parcel owner to select from the options provided in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(3) Unless otherwise specifically stated in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, each parcel shall be deemed to have only one front for purposes of determining the required front setback even if the parcel is bounded by a roadway or other easement on more than one side. When the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants do not provide for specific setback limitations, the applicable county or municipal setback limitations shall apply, and neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce or attempt to enforce any setback limitation that is inconsistent with the applicable county or municipal standard or standards.

(4) Each parcel owner shall be entitled to the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants concerning the architectural use of the parcel, and the construction of permitted structures and improvements on the

parcel and such rights and privileges shall not be unreasonably infringed upon or impaired by the association or any architectural, construction improvement, or other such similar committee of the association. If the association or any architectural, construction improvement, or other such similar committee of the association should unreasonably, knowingly, and willfully infringe upon or impair the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, the adversely affected parcel owner shall be entitled to recover damages caused by such infringement or impairment, including any costs and reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(5) Neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce any policy or restriction that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not. Neither the association nor any architectural, construction improvement, or other such similar committee of the association may rely upon a policy or restriction that is inconsistent with the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly

applied or not, in defense of any action taken in the name of or on behalf of the association against a parcel owner.

Section 12. Subsection (1) of section 720.305, Florida Statutes, is amended to read:

720.305 Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights; failure to fill sufficient number of vacancies on board of directors to constitute a quorum; appointment of receiver upon petition of any member.--

(1) Each member and the member's tenants, guests, and invitees, and each association, are governed by, and must comply with, this chapter, the governing documents of the community, and the rules of the association. Actions at law or in equity, or both, to redress alleged failure or refusal to comply with these provisions may be brought by the association or by any member against:

(a) The association;

(b) A member;

(c) Any director or officer of an association who willfully and knowingly fails to comply with these provisions; and

(d) Any tenants, guests, or invitees occupying a parcel or using the common areas.

The prevailing party in any such litigation is entitled to recover reasonable attorney's fees and costs. A member prevailing in an action between the association and the member under this section, in addition to recovering his or her

reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the member for his or her share of assessments levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law. This section does not deprive any person of any other available right or remedy.

Section 13. Paragraph (c) of subsection (1) of section 720.306, Florida Statutes, is amended to read:

720.306 Meetings of members; voting and election procedures; amendments.--

(1) QUORUM; AMENDMENTS.--

(c) Unless otherwise provided in the governing documents as originally recorded or permitted by this chapter or chapter 617, an amendment may not materially and adversely alter the proportionate voting interest appurtenant to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association unless the record parcel owner and all record owners of liens on the parcels join in the execution of the amendment. For purposes of this section, a change in quorum requirements is not an alteration of voting interests. The merger or consolidation of one or more associations under a plan of merger or consolidation under chapter 607 or chapter 617 shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

Section 14. Paragraph (t) is added to subsection (3) of section 720.307, Florida Statutes, to read:

720.307 Transition of association control in a

community.--With respect to homeowners' associations:

(3) At the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association, the developer shall, at the developer's expense, within no more than 90 days deliver the following documents to the board:

(t) The financial records, including financial statements of the association, and source documents from the incorporation of the association through the date of turnover. The records shall be audited by an independent certified public accountant for the period from the incorporation of the association or from the period covered by the last audit, if an audit has been performed for each fiscal year since incorporation. All financial statements shall be prepared in accordance with generally accepted accounting principles and shall be audited in accordance with generally accepted auditing standards, as prescribed by the Board of Accountancy, pursuant to chapter 473. The certified public accountant performing the audit shall examine to the extent necessary supporting documents and records, including the cash disbursements and related paid invoices to determine if expenditures were for association purposes and the billings, cash receipts, and related records of the association to determine that the developer was charged and paid the proper amounts of assessments. This paragraph applies to associations with a date of incorporation after December 31, 2007.

Section 15. Section 720.308, Florida Statutes, is amended to read:

720.308 Assessments and charges.--

(1) ASSESSMENTS.--For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof. Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors. While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association. This section does not apply to an association, no matter when created, if the association is created in a community that is included in an effective development-of-regional-impact development order as of the effective date of this act, together with any approved modifications thereto.

(2) GUARANTEES OF COMMON EXPENSES.--

(a) Establishment of a guarantee.--If a guarantee of the assessments of parcel owners is not included in the purchase contracts or declaration, any agreement establishing a guarantee shall only be effective upon the approval of a majority of the voting interests of the members other than the developer. Approval shall be expressed at a meeting of the members voting

in person or by limited proxy or by agreement in writing without a meeting if provided in the bylaws. Such guarantee shall meet the requirements of this section.

(b) Guarantee period.--The period of time for the guarantee shall be indicated by a specific beginning and ending date or event.

1. The ending date or event shall be the same for all of the members of an association, including members in different phases of the development.

2. The guarantee may provide for different intervals of time during a guarantee period with different dollar amounts for each such interval.

3. The guarantee may provide that after the initial stated period, the developer has an option to extend the guarantee for one or more additional stated periods. The extension of a guarantee is limited to extending the ending date or event; therefore, the developer does not have the option of changing the level of assessments guaranteed.

(3) MAXIMUM LEVEL OF ASSESSMENTS.--The stated dollar amount of the guarantee shall be an exact dollar amount for each parcel identified in the declaration. Regardless of the stated dollar amount of the guarantee, assessments charged to a member shall not exceed the maximum obligation of the member based on the total amount of the adopted budget and the member's proportionate ownership share of the common elements.

(4) CASH FUNDING REQUIREMENTS DURING GUARANTEE.--The cash payments required from the guarantor during the guarantee period shall be determined as follows:

(a) If at any time during the guarantee period the funds collected from member assessments at the guaranteed level and other revenues collected by the association are not sufficient to provide payment, on a timely basis, of all assessments, including the full funding of the reserves unless properly waived, the guarantor shall advance sufficient cash to the association at the time such payments are due.

(b) Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the assessments. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be considered separately. Any portion of the parcel assessment that is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

(5) CALCULATION OF GUARANTOR'S FINAL OBLIGATION.--The guarantor's total financial obligation to the association at the end of the guarantee period shall be determined on the accrual basis using the following formula: the guarantor shall pay any deficits that exceed the guaranteed amount, less the total regular periodic assessments earned by the association from the members other than the guarantor during the guarantee period regardless of whether the actual level charged was less than the

maximum guaranteed amount.

(6) EXPENSES.--Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the operating expenses. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be considered separately. Any portion of the parcel assessment that is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

Section 16. Section 720.311, Florida Statutes, is amended to read:

720.311 Dispute resolution.--

(1) The Legislature finds that alternative dispute resolution has made progress in reducing court dockets and trials and in offering a more efficient, cost-effective option to litigation. The filing of any petition for ~~mediation or~~ arbitration or the serving of an offer for presuit mediation as provided for in this section shall toll the applicable statute of limitations. Any recall dispute filed with the department pursuant to s. 720.303(10) shall be conducted by the department in accordance with the provisions of ss. 718.112(2)(j) and 718.1255 and the rules adopted by the division. In addition, the

department shall conduct mandatory binding arbitration of election disputes between a member and an association pursuant to s. 718.1255 and rules adopted by the division. Neither election disputes nor recall disputes are eligible for presuit mediation; these disputes shall be arbitrated by the department. At the conclusion of the proceeding, the department shall charge the parties a fee in an amount adequate to cover all costs and expenses incurred by the department in conducting the proceeding. Initially, the petitioner shall remit a filing fee of at least $200 to the department. The fees paid to the department shall become a recoverable cost in the arbitration proceeding, and the prevailing party in an arbitration proceeding shall recover its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. The department shall adopt rules to effectuate the purposes of this section.

(2)(a) Disputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association shall be the subject of an offer ~~filed with the department~~ for presuit ~~mandatory~~ mediation served by an aggrieved party before the dispute is filed in court. Presuit mediation proceedings must be conducted in accordance with the applicable Florida Rules of Civil Procedure, and these proceedings are privileged and confidential

to the same extent as court-ordered mediation. Disputes subject to presuit mediation under this section shall not include the collection of any assessment, fine, or other financial obligation, including attorney's fees and costs, claimed to be due or any action to enforce a prior mediation settlement agreement between the parties. Also, in any dispute subject to presuit mediation under this section where emergency relief is required, a motion for temporary injunctive relief may be filed with the court without first complying with the presuit mediation requirements of this section. After any issues regarding emergency or temporary relief are resolved, the court may either refer the parties to a mediation program administered by the courts or require mediation under this section. An arbitrator or judge may not consider any information or evidence arising from the presuit mediation proceeding except in a proceeding to impose sanctions for failure to attend a presuit mediation session or with the parties' agreement in a proceeding seeking to enforce the agreement. Persons who are not parties to the dispute may not attend the presuit mediation conference without the consent of all parties, except for counsel for the parties and a corporate representative designated by the association. When mediation is attended by a quorum of the board, such mediation is not a board meeting for purposes of notice and participation set forth in s. 720.303. An aggrieved party shall serve on the responding party a written offer to participate in presuit mediation in substantially the following form:

STATUTORY OFFER TO PARTICIPATE IN PRESUIT MEDIATION

The alleged aggrieved party, _____, hereby offers to _____, as the responding party, to enter into presuit mediation in connection with the following dispute, which by statute is of a type that is subject to presuit mediation:

(List specific nature of the dispute or disputes to be mediated and the authority supporting a finding of a violation as to each dispute.)

Pursuant to section 720.311, Florida Statutes, this offer to resolve the dispute through presuit mediation is required before a lawsuit can be filed concerning the dispute. Pursuant to the statute, the aggrieved party is hereby offering to engage in presuit mediation with a neutral third-party mediator in order to attempt to resolve this dispute without court action, and the aggrieved party demands that you likewise agree to this process. If you fail to agree to presuit mediation, or if you agree and later fail to follow through with your agreement to mediate, suit may be brought against you without further warning.

The process of mediation involves a supervised negotiation process in which a trained, neutral third-party mediator meets with both parties and assists

them in exploring possible opportunities for resolving part or all of the dispute. The mediation process is a voluntary one. By agreeing to participate in presuit mediation, you are not bound in any way to change your position or to enter into any type of agreement. Furthermore, the mediator has no authority to make any decisions in this matter or to determine who is right or wrong and merely acts as a facilitator to ensure that each party understands the position of the other party and that all reasonable settlement options are fully explored. All mediation communications are confidential under the Mediation Confidentiality and Privilege Act pursuant to sections 44.401-44.406, Florida Statutes, and a mediation participant may not disclose a mediation communication to a person other than a mediation participant or a participant's counsel.

If an agreement is reached, it shall be reduced to writing and becomes a binding and enforceable commitment of the parties. A resolution of one or more disputes in this fashion avoids the need to litigate these issues in court. The failure to reach an agreement, or the failure of a party to participate in the process, results in the mediator's declaring an impasse in the mediation, after which the aggrieved party may proceed to court on all outstanding, unsettled disputes.

The aggrieved party has selected and hereby lists three certified mediators who we believe to be neutral and qualified to mediate the dispute. You have the right to select any one of these mediators. The fact that one party may be familiar with one or more of the listed mediators does not mean that the mediator cannot act as a neutral and impartial facilitator. Any mediator who cannot act in this capacity ethically must decline to accept engagement. The mediators that we suggest, and their current hourly rates, are as follows:

(List the names, addresses, telephone numbers, and hourly rates of the mediators. Other pertinent information about the background of the mediators may be included as an attachment.)

You may contact the offices of these mediators to confirm that the listed mediators will be neutral and will not show any favoritism toward either party. The names of certified mediators may be found through the office of the clerk of the circuit court for this circuit.

If you agree to participate in the presuit mediation process, the statute requires that each party is to pay one-half of the costs and fees involved in the

presuit mediation process unless otherwise agreed by all parties. An average mediation may require 3 to 4 hours of the mediator's time, including some preparation time, and each party would need to pay one-half of the mediator's fees as well as his or her own attorney's fees if he or she chooses to employ an attorney in connection with the mediation. However, use of an attorney is not required and is at the option of each party. The mediator may require the advance payment of some or all of the anticipated fees. The aggrieved party hereby agrees to pay or prepay one-half of the mediator's estimated fees and to forward this amount or such other reasonable advance deposits as the mediator may require for this purpose. Any funds deposited will be returned to you if these are in excess of your share of the fees incurred.

If you agree to participate in presuit mediation in order to attempt to resolve the dispute and thereby avoid further legal action, please sign below and clearly indicate which mediator is acceptable to you. We will then ask the mediator to schedule a mutually convenient time and place for the mediation conference to be held. The mediation conference must be held within 90 days after the date of this letter unless extended by mutual written agreement. In the event that you fail to respond within 20 days after the date

of this letter, or if you fail to agree to at least one of the mediators that we have suggested and to pay or prepay to the mediator one-half of the costs involved, the aggrieved party will be authorized to proceed with the filing of a lawsuit against you without further notice and may seek an award of attorney's fees or costs incurred in attempting to obtain mediation.

Should you wish, you may also elect to waive presuit mediation so that this matter may proceed directly to court.

Therefore, please give this matter your immediate attention. By law, your response must be mailed by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail to the address shown on this offer.

_____

_____

RESPONDING PARTY: CHOOSE ONLY ONE OF THE TWO OPTIONS BELOW. YOUR SIGNATURE INDICATES YOUR AGREEMENT TO THAT CHOICE.

AGREEMENT TO MEDIATE

The undersigned hereby agrees to participate in presuit mediation and agrees to the following mediator or mediators as acceptable to mediate this dispute:

(List acceptable mediator or mediators.)

I/we further agree to pay or prepay one-half of the mediator's fees and to forward such advance deposits as the mediator may require for this purpose.

_____

Signature of responding party #1

_____

Signature of responding party #2 (if applicable)(if property is owned by more than one person, all owners must sign)

WAIVER OF MEDIATION

The undersigned hereby waives the right to participate in presuit mediation of the dispute listed above and agrees to allow the aggrieved party to proceed in court on such matters.

_____

Signature of responding party #1

1037 _____

1038 Signature of responding party #2 (if applicable)(if

1039 property is owned by more than one person, all owners

1040 must sign)

1041

1042 (b) Service of the statutory offer to participate in

1043 presuit mediation shall be effected by sending a letter in

1044 substantial conformity with the above form by certified mail,

1045 return receipt requested, with an additional copy being sent by

1046 regular first-class mail, to the address of the responding party

1047 as it last appears on the books and records of the association.

1048 The responding party shall have 20 days from the date of the

1049 mailing of the statutory offer to serve a response to the

1050 aggrieved party in writing. The response shall be served by

1051 certified mail, return receipt requested, with an additional

1052 copy being sent by regular first-class mail, to the address

1053 shown on the statutory offer. In the alternative, the responding

1054 party may waive mediation in writing. Notwithstanding the

1055 foregoing, once the parties have agreed on a mediator, the

1056 mediator may reschedule the mediation for a date and time

1057 mutually convenient to the parties. ~~The department shall conduct~~

1058 ~~the proceedings through the use of department mediators or refer~~

1059 ~~the disputes to private mediators who have been duly certified~~

1060 ~~by the department as provided in paragraph (c).~~ The parties

1061 shall share the costs of presuit mediation equally, including

1062 the fee charged by the mediator, if any, unless the parties

1063 agree otherwise, and the mediator may require advance payment of

1064 its reasonable fees and costs. The failure of any party to

respond to a demand or response, to agree upon a mediator, to make payment of fees and costs within the time established by the mediator, or to appear for a scheduled mediation session shall operate as an impasse in the presuit mediation by such party, entitling the other party to proceed in court and to seek an award of the costs and fees associated with the mediation. Additionally, if any presuit mediation session cannot be scheduled and conducted within 90 days after the offer to participate in mediation was filed, an impasse shall be deemed to have occurred unless both parties agree to extend this deadline. ~~If a department mediator is used, the department may charge such fee as is necessary to pay expenses of the mediation, including, but not limited to, the salary and benefits of the mediator and any travel expenses incurred. The petitioner shall initially file with the department upon filing the disputes, a filing fee of $200, which shall be used to defray the costs of the mediation. At the conclusion of the mediation, the department shall charge to the parties, to be shared equally unless otherwise agreed by the parties, such further fees as are necessary to fully reimburse the department for all expenses incurred in the mediation.~~

(c) ~~(b)~~ If presuit mediation as described in paragraph (a) is not successful in resolving all issues between the parties, the parties may file the unresolved dispute in a court of competent jurisdiction or elect to enter into binding or nonbinding arbitration pursuant to the procedures set forth in s. 718.1255 and rules adopted by the division, with the arbitration proceeding to be conducted by a department

arbitrator or by a private arbitrator certified by the department. If all parties do not agree to arbitration proceedings following an unsuccessful presuit mediation, any party may file the dispute in court. A final order resulting from nonbinding arbitration is final and enforceable in the courts if a complaint for trial de novo is not filed in a court of competent jurisdiction within 30 days after entry of the order. As to any issue or dispute that is not resolved at presuit mediation, and as to any issue that is settled at presuit mediation but is thereafter subject to an action seeking enforcement of the mediation settlement, the prevailing party in any subsequent arbitration or litigation proceeding shall be entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process.

(d) ~~(c) The department shall develop a certification and training program for private mediators and private arbitrators which shall emphasize experience and expertise in the area of the operation of community associations.~~ A mediator or arbitrator shall be certified to conduct mediation or arbitration under this section ~~by the department~~ only if he or she has been certified as a circuit court civil mediator or arbitrator, respectively, pursuant to the requirements established ~~attended at least 20 hours of training in mediation or arbitration, as appropriate, and only if the applicant has mediated or arbitrated at least 10 disputes involving community associations within 5 years prior to the date of the application, or has mediated or arbitrated 10 disputes in any area within 5 years prior to the date of application and has~~

~~completed 20 hours of training in community association disputes. In order to be certified by the department, any mediator must also be certified~~ by the Florida Supreme Court. ~~The department may conduct the training and certification program within the department or may contract with an outside vendor to perform the training or certification. The expenses of operating the training and certification and training program shall be paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes referred to in this subsection and by the training fees.~~

(e) ~~(d)~~ The presuit mediation procedures provided by this subsection may be used by a Florida corporation responsible for the operation of a community in which the voting members are parcel owners or their representatives, in which membership in the corporation is not a mandatory condition of parcel ownership, or which is not authorized to impose an assessment that may become a lien on the parcel.

~~(3) The department shall develop an education program to assist homeowners, associations, board members, and managers in understanding and increasing awareness of the operation of homeowners' associations pursuant to this chapter and in understanding the use of alternative dispute resolution techniques in resolving disputes between parcel owners and associations or between owners. Such education program may include the development of pamphlets and other written instructional guides, the holding of classes and meetings by department employees or outside vendors, as the department~~

~~determines, and the creation and maintenance of a website containing instructional materials. The expenses of operating the education program shall be initially paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes referred to in this subsection.~~

Section 17. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2007.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

Bill No. **HB 433**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Committee on Courts

Representative(s) Domino offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 712.11, Florida Statutes, is created to read:

712.11 Covenant revitalization.--A homeowners' association not otherwise subject to chapter 720 may use the procedures set forth in ss. 720.403-720.407 to revive covenants that have lapsed under the terms of this chapter.

Section 2. Subsection (5) is added to section 718.106, Florida Statutes, to read:

718.106 Condominium parcels; appurtenances; possession and enjoyment.--

(5) A local government may not prohibit condominium unit owners or an association from permitting guests, licensees, or invitees access to a public beach adjacent to or adjoining the condominium property.

Section 3. Effective October 1, 2007, subsection (11) of section 718.110, Florida Statutes, is amended to read:

718.110 Amendment of declaration; correction of error or omission in declaration by circuit court.--

(11) The Legislature finds that the procurement of mortgagee consent to amendments that do not affect the rights or interests of mortgagees is an unreasonable and substantial logistical and financial burden on the unit owners and that there is a compelling state interest in enabling the members of a condominium association to approve amendments to the condominium documents through legal means. Accordingly, and notwithstanding any provision to the contrary contained in this section:

(a) As to any mortgage recorded on or after October 1, 2007, any provision in the declaration, articles of incorporation, or bylaws that requires ~~recorded after April 1, 1992, may not require~~ the consent or joinder of some or all mortgagees of units or any other portion of the condominium property to or in amendments to the declaration, articles of incorporation, or bylaws or for any other matter shall be enforceable only as to the following matters: ~~unless the requirement is limited to amendments materially affecting the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, and unless the requirement provides that such consent may not be unreasonably withheld. It shall be presumed that, except as to~~

1. Those matters described in subsections (4) and (8).~~,~~

2. Amendments to the declaration, articles of incorporation, or bylaws that adversely affect the priority of the mortgagee's lien or the mortgagee's rights to foreclose its lien or that otherwise materially affect the rights and interests of the mortgagees.

(b) As to mortgages recorded before October 1, 2007, any existing provisions in the declaration, articles of incorporation, or bylaws requiring mortgagee consent shall be enforceable.

(c) In securing consent or joinder, the association shall be entitled to rely upon the public records to identify the holders of outstanding mortgages. The association may use the address provided in the original recorded mortgage document, unless there is a different address for the holder of the mortgage in a recorded assignment or modification of the mortgage, which recorded assignment or modification must reference the official records book and page on which the original mortgage was recorded. Once the association has identified the recorded mortgages of record, the association shall, in writing, request of each unit owner whose unit is encumbered by a mortgage of record any information the owner has in his or her possession regarding the name and address of the person to whom mortgage payments are currently being made. Notice shall be sent to such person if the address provided in the original recorded mortgage document is different from the name and address of the mortgagee or assignee of the mortgage as shown by the public record. The association shall be deemed to have complied with this requirement by making the written request of the unit owners required under this paragraph. Any notices required to be sent to the mortgagees under this paragraph shall be sent to all available addresses provided to the association.

(d) Any notice to the mortgagees required under paragraph (c) may be sent by a method that establishes proof of delivery, and any mortgagee who fails to respond within 60 days after the

date of mailing shall be deemed to have consented to the amendment.

(e) For those amendments requiring mortgagee consent on or after October 1, 2007, ~~do not materially affect the rights or interests of mortgagees.~~ in the event mortgagee consent is provided other than by properly recorded joinder, such consent shall be evidenced by affidavit of the association recorded in the public records of the county where the declaration is recorded. Any amendment adopted without the required consent of a mortgagee shall be voidable only by a mortgagee who was entitled to notice and an opportunity to consent. An action to void an amendment shall be subject to the statute of limitations beginning 5 years after the date of discovery as to the amendments described in subparagraphs (a)1. and 2. and 5 years after the date of recordation of the certificate of amendment for all other amendments. This provision shall apply to all mortgages, regardless of the date of recordation of the mortgage.

(f) Notwithstanding the provisions of this section, any amendment or amendments to conform a declaration of condominium to the insurance coverage provisions in s. 718,111(11), may be made as provided in that section.

Section 4. Section 718.114, Florida Statutes, is amended to read:

718.114 Association powers.--An association has the power to enter into agreements, to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. It has this power whether or not the lands or facilities are contiguous to the lands of the condominium, if they are intended to provide enjoyment,

recreation, or other use or benefit to the unit owners. All of these leaseholds, memberships, and other possessory or use interests existing or created at the time of recording the declaration must be stated and fully described in the declaration. Subsequent to the recording of the declaration, agreements acquiring these leaseholds, memberships, or other possessory or use interests not entered into within 12 months following the recording of the declaration shall be considered a material alteration or substantial addition to the real property that is association property, and the association may not acquire or enter into agreements acquiring these leaseholds, memberships, or other possessory or use interests except as authorized by the declaration as provided in s. 718.113. The declaration may provide that the rental, membership fees, operations, replacements, and other expenses are common expenses and may impose covenants and restrictions concerning their use and may contain other provisions not inconsistent with this chapter. A condominium association may conduct bingo games as provided in s. 849.0931.

Section 5. Subsections (1) and (2) of section 718.404, Florida Statutes, are amended to read:

718.404 Mixed-use condominiums.--When a condominium consists of both residential and commercial units, the following provisions shall apply:

(1) The condominium documents shall not provide that the owner of any commercial unit shall have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association. This subsection shall apply retroactively as a remedial measure.

(2) Subject to s. 718.301, where the number of residential units in the condominium equals or exceeds 50 percent of the

total units operated by the association, owners of the residential units shall be entitled to vote for a majority of the seats on the board of administration. This subsection shall apply retroactively as a remedial measure.

Section 6. Subsections (18) through (27) of section 719.103, Florida Statutes, are renumbered as subsections (19) through (28), respectively, and a new subsection (18) is added to that section to read:

719.103 Definitions.--As used in this chapter:

(18) "Equity facilities club" means a club comprised of recreational facilities in which proprietary membership interests are sold to individuals, which membership interests entitle the individuals to use certain physical facilities owned by the equity club. Such physical facilities do not include a residential unit or accommodation. For purposes of this definition, the term "accommodation" shall include, but is not limited to, any apartment, residential cooperative unit, residential condominium unit, cabin, lodge, hotel or motel room, or other accommodation designed for overnight occupancy for one or more individuals.

Section 7. Section 719.507, Florida Statutes, is amended to read:

719.507 Zoning and building laws, ordinances, and regulations.--All laws, ordinances, and regulations concerning buildings or zoning shall be construed and applied with reference to the nature and use of such property, without regard to the form of ownership. No law, ordinance, or regulation shall establish any requirement concerning the use, location, placement, or construction of buildings or other improvements which are, or may thereafter be, subjected to the cooperative or equity facilities club form of ownership, unless such

requirement shall be equally applicable to all buildings and improvements of the same kind not then, or thereafter to be, subjected to the cooperative or equity facilities club form of ownership. This section does not apply if the owner in fee of any land enters into and records a covenant that existing improvements or improvements to be constructed shall not be converted to the cooperative form of residential ownership prior to 5 years after the later of the date of the covenant or completion date of the improvements. Such covenant shall be entered into with the governing body of the municipality in which the land is located or, if the land is not located in a municipality, with the governing body of the county in which the land is located.

Section 8. Subsections (4) and (5) of section 720.302, Florida Statutes, are amended to read:

720.302 Purposes, scope, and application.--

(4) This chapter does not apply to any association that is subject to regulation under chapter 718, chapter 719, or chapter 721~~,~~ or to any nonmandatory association formed under chapter 723, except to the extent that a provision of chapter 718, chapter 719, or chapter 721 is expressly incorporated into this chapter for the purpose of regulating homeowners' associations.

(5) Unless expressly stated to the contrary, corporations ~~not for profit~~ that operate residential homeowners' associations in this state shall be governed by and subject to chapter 607, if the association was incorporated under that chapter, or to chapter 617, if the association was incorporated under that chapter, and this chapter. This subsection is intended to clarify existing law.

Section 9. Subsections (2), (6), and (7) of section 720.303, Florida Statutes, are amended, and paragraph (d) is added to subsection (5) of that section, to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.--

(2) BOARD MEETINGS.--

(a) A meeting of the board of directors of an association occurs whenever a quorum of the board gathers to conduct association business. All meetings of the board must be open to all members except for meetings between the board and its attorney with respect to proposed or pending litigation where the contents of the discussion would otherwise be governed by the attorney-client privilege. The provisions of this subsection shall also apply to the meetings of any committee or other similar body when a final decision will be made regarding the expenditure of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

(b) Members have the right to attend all meetings of the board and to speak on any matter placed on the agenda by petition of the voting interests for at least 3 minutes. The association may adopt written reasonable rules expanding the right of members to speak and governing the frequency, duration, and other manner of member statements, which rules must be consistent with this paragraph and may include a sign-up sheet for members wishing to speak. Notwithstanding any other law, the requirement that board meetings and committee meetings be open to the members is inapplicable to meetings between the board or a committee and the association's attorney, with respect to

meetings of the board held for the purpose of discussing personnel matters.

(c) The bylaws shall provide for giving notice to parcel owners and members of all board meetings and, if they do not do so, shall be deemed to provide the following:

1. Notices of all board meetings must be posted in a conspicuous place in the community at least 48 hours in advance of a meeting, except in an emergency. In the alternative, if notice is not posted in a conspicuous place in the community, notice of each board meeting must be mailed or delivered to each member at least 7 days before the meeting, except in an emergency. Notwithstanding this general notice requirement, for communities with more than 100 members, the bylaws may provide for a reasonable alternative to posting or mailing of notice for each board meeting, including publication of notice, provision of a schedule of board meetings, or the conspicuous posting and repeated broadcasting of the notice on a closed-circuit cable television system serving the homeowners' association. However, if broadcast notice is used in lieu of a notice posted physically in the community, the notice must be broadcast at least four times every broadcast hour of each day that a posted notice is otherwise required. When broadcast notice is provided, the notice and agenda must be broadcast in a manner and for a sufficient continuous length of time so as to allow an average reader to observe the notice and read and comprehend the entire content of the notice and the agenda. The bylaws or amended bylaws may provide for giving notice by electronic transmission in a manner authorized by law for meetings of the board of directors, committee meetings requiring notice under this section, and annual and special meetings of the members;

however, a member must consent in writing to receiving notice by electronic transmission.

2. An assessment may not be levied at a board meeting unless the notice of the meeting includes a statement that assessments will be considered and the nature of the assessments. Written notice of any meeting at which special assessments will be considered or at which amendments to rules regarding parcel use will be considered must be mailed, delivered, or electronically transmitted to the members and parcel owners and posted conspicuously on the property or broadcast on closed-circuit cable television not less than 14 days before the meeting.

3. Directors may not vote by proxy or by secret ballot at board meetings, except that secret ballots may be used in the election of officers. This subsection also applies to the meetings of any committee or other similar body, when a final decision will be made regarding the expenditure of association funds, and to any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

(d) If 20 percent of the total voting interests petition the board to address an item of business, the board shall at its next regular board meeting or at a special meeting of the board, but not later than 60 days after the receipt of the petition, take the petitioned item up on an agenda. The board shall give all members notice of the meeting at which the petitioned item shall be addressed in accordance with the 14-day notice requirement pursuant to subparagraph (c)2. Each member shall have the right to speak for at least 3 minutes on each matter placed on the agenda by petition, provided that the member signs

the sign-up sheet, if one is provided, or submits a written request to speak prior to the meeting. Other than addressing the petitioned item at the meeting, the board is not obligated to take any other action requested by the petition.

(5) INSPECTION AND COPYING OF RECORDS.--The official records shall be maintained within the state and must be open to inspection and available for photocopying by members or their authorized agents at reasonable times and places within 10 business days after receipt of a written request for access. This subsection may be complied with by having a copy of the official records available for inspection or copying in the community. If the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages.

(d) The association or its authorized agent is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association other than information or documents required by this chapter to be made available or disclosed. The association or its authorized agent may charge a reasonable fee to the prospective purchaser or lienholder or the current parcel owner or member for providing good faith responses to requests for information by or on behalf of a prospective purchaser or lienholder, other than that required by law, if the fee does not exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

(6) BUDGETS.--

(a) The association shall prepare an annual budget that sets out the annual operating expenses. The budget must reflect the estimated revenues and expenses for that year and the

estimated surplus or deficit as of the end of the current year. The budget must set out separately all fees or charges paid for by the association for recreational amenities, whether owned by the association, the developer, or another person. The association shall provide each member with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member. The copy must be provided to the member within the time limits set forth in subsection (5).

(b) In addition to annual operating expenses, the budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the governing documents do not limit increases in assessments, including reserves. If the budget of the association includes reserve accounts, such reserves shall be determined, maintained, and waived in the manner provided in this subsection. Once an association provides for reserve accounts in the budget, the association shall thereafter determine, maintain, and waive reserves in compliance with this subsection.

(c) If the budget of the association does not provide for reserve accounts governed by this subsection and the association is responsible for the repair and maintenance of capital improvements that may result in a special assessment if reserves are not provided, each financial report for the preceding fiscal year required by subsection (7) shall contain the following statement in conspicuous type: THE BUDGET OF THE ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL ASSESSMENTS. OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO THE PROVISIONS OF SECTION 720.303(6), FLORIDA STATUTES, UPON THE

APPROVAL OF NOT LESS THAN A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE ASSOCIATION.

(d) An association shall be deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. If reserve accounts are not initially provided for by the developer, the membership of the association may elect to do so upon the affirmative approval of not less than a majority of the total voting interests of the association. Such approval may be attained by vote of the members at a duly called meeting of the membership or upon a written consent executed by not less than a majority of the total voting interests in the community. The approval action of the membership shall state that reserve accounts shall be provided for in the budget and designate the components for which the reserve accounts are to be established. Upon approval by the membership, the board of directors shall provide for the required reserve accounts for inclusion in the budget in the next fiscal year following the approval and in each year thereafter. Once established as provided in this subsection, the reserve accounts shall be funded or maintained or shall have their funding waived in the manner provided in paragraph (f).

(e) The amount to be reserved in any account established shall be computed by means of a formula that is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. The association may adjust replacement reserve assessments annually to take into account any changes in estimates of cost or useful life of a reserve item.

(f) Once a reserve account or reserve accounts are established, the membership of the association, upon a majority vote at a meeting at which a quorum is present, may provide for no reserves or less reserves than required by this section. If a meeting of the unit owners has been called to determine whether to waive or reduce the funding of reserves and no such result is achieved or a quorum is not present, the reserves as included in the budget shall go into effect. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves. Any vote taken pursuant to this subsection to waive or reduce reserves shall be applicable only to one budget year.

(g) Funding formulas for reserves authorized by this section shall be based on either a separate analysis of each of the required assets or a pooled analysis of two or more of the required assets.

1. If the association maintains separate reserve accounts for each of the required assets, the amount of the contribution to each reserve account shall be the sum of the following two calculations:

a. The total amount necessary, if any, to bring a negative component balance to zero.

b. The total estimated deferred maintenance expense or estimated replacement cost of the reserve component less the estimated balance of the reserve component as of the beginning of the period for which the budget will be in effect. The remainder, if greater than zero, shall be divided by the estimated remaining useful life of the component.

The formula may be adjusted each year for changes in estimates and deferred maintenance performed during the year and may

include factors such as inflation and earnings on invested funds.

2. If the association maintains a pooled account of two or more of the required reserve assets, the amount of the contribution to the pooled reserve account as disclosed on the proposed budget shall not be less than that required to ensure that the balance on hand at the beginning of the period for which the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful life of all of the assets that make up the reserve pool are equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all of the assets that make up the reserve pool, based on the current reserve analysis. The projected annual cash inflows may include estimated earnings from investment of principal. The reserve funding formula shall not include any type of balloon payments.

(h) Reserve funds and any interest accruing thereon shall remain in the reserve account or accounts and shall be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a meeting at which a quorum is present. Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association shall not vote to use reserves for purposes other than those for which they were intended without the approval of a majority of all nondeveloper voting interests voting in person or by limited proxy at a duly called meeting of the association.

(7) FINANCIAL REPORTING.--Within 90 days after the end of the fiscal year, or annually on the date provided in the bylaws, the association shall prepare and complete, or contract with a third party for the preparation and completion of, a financial

report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall ~~prepare an annual financial report within 60 days after the close of the fiscal year. The association shall~~, within the time limits set forth in subsection (5), provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare or cause to be prepared a complete set of financial statements in accordance with generally accepted accounting principles as adopted by the Board of Accountancy. The financial statements shall be based upon the association's total annual revenues, as follows:

1. An association with total annual revenues of $100,000 or more, but less than $200,000, shall prepare compiled financial statements.

2. An association with total annual revenues of at least $200,000, but less than $400,000, shall prepare reviewed financial statements.

3. An association with total annual revenues of $400,000 or more shall prepare audited financial statements.

(b)1. An association with total annual revenues of less than $100,000 shall prepare a report of cash receipts and expenditures.

2. An association in a community of fewer than 50 parcels, regardless of the association's annual revenues, may prepare a report of cash receipts and expenditures in lieu of financial

statements required by paragraph (a) unless the governing documents provide otherwise.

3. A report of cash receipts and disbursement must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including, but not limited to, the following, as applicable: costs for security, professional, and management fees and expenses; taxes; costs for recreation facilities; expenses for refuse collection and utility services; expenses for lawn care; costs for building maintenance and repair; insurance costs; administration and salary expenses; and reserves if maintained by the association.

(c) If 20 percent of the parcel owners petition the board for a level of financial reporting higher than that required by this section, the association shall duly notice and hold a meeting of members within 30 days of receipt of the petition for the purpose of voting on raising the level of reporting for that fiscal year. Upon approval of a majority of the total voting interests of the parcel owners, the association shall prepare or cause to be prepared, shall amend the budget or adopt a special assessment to pay for the financial report regardless of any provision to the contrary in the governing documents, and shall provide within 90 days of the meeting or the end of the fiscal year, whichever occurs later:

1. Compiled, reviewed, or audited financial statements, if the association is otherwise required to prepare a report of cash receipts and expenditures;

2. Reviewed or audited financial statements, if the association is otherwise required to prepare compiled financial statements; or

3. Audited financial statements if the association is otherwise required to prepare reviewed financial statements.

(d) If approved by a majority of the voting interests present at a properly called meeting of the association, an association may prepare or cause to be prepared:

1. A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;

2. A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or

3. A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

Section 10. Subsection (2) of section 720.303, Florida Statutes, as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, is repealed.

Section 11. Section 720.3035, Florida Statutes, is created to read:

720.3035 Architectural control covenants; parcel owner improvements; rights and privileges.--

(1) The authority of an association or any architectural, construction improvement, or other such similar committee of an association to review and approve plans and specifications for the location, size, type, or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement located on a parcel, shall be permitted only to the extent that the authority is specifically stated or reasonably inferred as to such location, size, type, or appearance in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(2) If the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants provides options for the use of material, the size of the structure or improvement, the design of the structure or improvement, or the location of the structure or improvement on the parcel, neither the association nor any architectural, construction improvement, or other such similar committee of the association shall restrict the right of a parcel owner to select from the options provided in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(3) Unless otherwise specifically stated in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, each parcel shall be deemed to have only one front for purposes of determining the required front setback even if the parcel is bounded by a roadway or other easement on more than one side. When the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants do not provide for specific setback limitations, the applicable county or municipal setback limitations shall apply, and neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce or attempt to enforce any setback limitation that is inconsistent with the applicable county or municipal standard or standards.

(4) Each parcel owner shall be entitled to the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants concerning the architectural use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably

infringed upon or impaired by the association or any architectural, construction improvement, or other such similar committee of the association. If the association or any architectural, construction improvement, or other such similar committee of the association should unreasonably, knowingly, and willfully infringe upon or impair the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, the adversely affected parcel owner shall be entitled to recover damages caused by such infringement or impairment, including any costs and reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(5) Neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce any policy or restriction that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not. Neither the association nor any architectural, construction improvement, or other such similar committee of the association may rely upon a policy or restriction that is inconsistent with the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not, in defense of any action taken in the name of or on behalf of the association against a parcel owner.

Section 12. Subsection (1) of section 720.305, Florida Statutes, is amended to read:

720.305 Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights; failure to fill sufficient number of vacancies on board of directors to constitute a quorum; appointment of receiver upon petition of any member.--

(1) Each member and the member's tenants, guests, and invitees, and each association, are governed by, and must comply with, this chapter, the governing documents of the community, and the rules of the association. Actions at law or in equity, or both, to redress alleged failure or refusal to comply with these provisions may be brought by the association or by any member against:

(a) The association;

(b) A member;

(c) Any director or officer of an association who willfully and knowingly fails to comply with these provisions; and

(d) Any tenants, guests, or invitees occupying a parcel or using the common areas.

The prevailing party in any such litigation is entitled to recover reasonable attorney's fees and costs. A member prevailing in an action between the association and the member under this section, in addition to recovering his or her reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the member for his or her share of assessments levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law. This section does not deprive any person of any other available right or remedy.

Section 13. Paragraph (c) of subsection (1) of section 720.306, Florida Statutes, is amended to read:

720.306 Meetings of members; voting and election procedures; amendments.--

(1) QUORUM; AMENDMENTS.--

(c) Unless otherwise provided in the governing documents as originally recorded or permitted by this chapter or chapter 617, an amendment may not materially and adversely alter the proportionate voting interest appurtenant to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association unless the record parcel owner and all record owners of liens on the parcels join in the execution of the amendment. For purposes of this section, a change in quorum requirements is not an alteration of voting interests. The merger or consolidation of one or more associations under a plan of merger or consolidation under chapter 607 or chapter 617 shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

Section 14. Paragraph (t) is added to subsection (3) of section 720.307, Florida Statutes, to read:

720.307 Transition of association control in a community.--With respect to homeowners' associations:

(3) At the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association, the developer shall, at the developer's expense, within no more than 90 days deliver the following documents to the board:

(t) The financial records, including financial statements of the association, and source documents from the incorporation of the association through the date of turnover. The records

shall be audited by an independent certified public accountant for the period from the incorporation of the association or from the period covered by the last audit, if an audit has been performed for each fiscal year since incorporation. All financial statements shall be prepared in accordance with generally accepted accounting principles and shall be audited in accordance with generally accepted auditing standards, as prescribed by the Board of Accountancy, pursuant to chapter 473. The certified public accountant performing the audit shall examine to the extent necessary supporting documents and records, including the cash disbursements and related paid invoices to determine if expenditures were for association purposes and the billings, cash receipts, and related records of the association to determine that the developer was charged and paid the proper amounts of assessments. This paragraph applies to associations with a date of incorporation after December 31, 2007.

Section 15. Section 720.308, Florida Statutes, is amended to read:

720.308 Assessments and charges.--

(1) ASSESSMENTS.--For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof. Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors. While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses

and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association. This section does not apply to an association, no matter when created, if the association is created in a community that is included in an effective development-of-regional-impact development order as of the effective date of this act, together with any approved modifications thereto.

(2) GUARANTEES OF COMMON EXPENSES.--

(a) Establishment of a guarantee.--If a guarantee of the assessments of parcel owners is not included in the purchase contracts or declaration, any agreement establishing a guarantee shall only be effective upon the approval of a majority of the voting interests of the members other than the developer. Approval shall be expressed at a meeting of the members voting in person or by limited proxy or by agreement in writing without a meeting if provided in the bylaws. Such guarantee must meet the requirements of this section.

(b) Guarantee period.--The period of time for the guarantee shall be indicated by a specific beginning and ending date or event.

1. The ending date or event shall be the same for all of the members of an association, including members in different phases of the development.

2. The guarantee may provide for different intervals of time during a guarantee period with different dollar amounts for each such interval.

3. The guarantee may provide that after the initial stated period, the developer has an option to extend the guarantee for one or more additional stated periods. The extension of a

guarantee is limited to extending the ending date or event; therefore, the developer does not have the option of changing the level of assessments guaranteed.

(3) MAXIMUM LEVEL OF ASSESSMENTS.--The stated dollar amount of the guarantee shall be an exact dollar amount for each parcel identified in the declaration. Regardless of the stated dollar amount of the guarantee, assessments charged to a member shall not exceed the maximum obligation of the member based on the total amount of the adopted budget and the member's proportionate share of the expenses as described in the governing documents.

(4) CASH FUNDING REQUIREMENTS DURING GUARANTEE.--The cash payments required from the guarantor during the guarantee period shall be determined as follows:

(a) If at any time during the guarantee period the funds collected from member assessments at the guaranteed level and other revenues collected by the association are not sufficient to provide payment, on a timely basis, of all assessments, including the full funding of the reserves unless properly waived, the guarantor shall advance sufficient cash to the association at the time such payments are due.

(b) Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the assessments. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be

considered separately. Any portion of the parcel assessment which is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

(5) CALCULATION OF GUARANTOR'S FINAL OBLIGATION.--The guarantor's total financial obligation to the association at the end of the guarantee period shall be determined on the accrual basis using the following formula: the guarantor shall pay any deficits that exceed the guaranteed amount, less the total regular periodic assessments earned by the association from the members other than the guarantor during the guarantee period regardless of whether the actual level charged was less than the maximum guaranteed amount.

(6) EXPENSES.--Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the operating expenses. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be considered separately. Any portion of the parcel assessment which is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

Section 16. Section 720.311, Florida Statutes, is amended to read:

720.311 Dispute resolution.--

(1) The Legislature finds that alternative dispute resolution has made progress in reducing court dockets and

trials and in offering a more efficient, cost-effective option to litigation. The filing of any petition for ~~mediation or~~ arbitration or the serving of a demand for presuit mediation as provided for in this section shall toll the applicable statute of limitations. Any recall dispute filed with the department pursuant to s. 720.303(10) shall be conducted by the department in accordance with the provisions of ss. 718.112(2)(j) and 718.1255 and the rules adopted by the division. In addition, the department shall conduct mandatory binding arbitration of election disputes between a member and an association pursuant to s. 718.1255 and rules adopted by the division. Neither election disputes nor recall disputes are eligible for presuit mediation; these disputes shall be arbitrated by the department. At the conclusion of the proceeding, the department shall charge the parties a fee in an amount adequate to cover all costs and expenses incurred by the department in conducting the proceeding. Initially, the petitioner shall remit a filing fee of at least $200 to the department. The fees paid to the department shall become a recoverable cost in the arbitration proceeding, and the prevailing party in an arbitration proceeding shall recover its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. The department shall adopt rules to effectuate the purposes of this section.

(2)(a) Disputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association shall be the subject

of a demand ~~filed with the department~~ for presuit ~~mandatory~~ mediation served by an aggrieved party before the dispute is filed in court. Presuit mediation proceedings must be conducted in accordance with the applicable Florida Rules of Civil Procedure, and these proceedings are privileged and confidential to the same extent as court-ordered mediation. Disputes subject to presuit mediation under this section shall not include the collection of any assessment, fine, or other financial obligation, including attorney's fees and costs, claimed to be due or any action to enforce a prior mediation settlement agreement between the parties. Also, in any dispute subject to presuit mediation under this section where emergency relief is required, a motion for temporary injunctive relief may be filed with the court without first complying with the presuit mediation requirements of this section. After any issues regarding emergency or temporary relief are resolved, the court may either refer the parties to a mediation program administered by the courts or require mediation under this section. An arbitrator or judge may not consider any information or evidence arising from the presuit mediation proceeding except in a proceeding to impose sanctions for failure to attend a presuit mediation session or to enforce a mediated settlement agreement. Persons who are not parties to the dispute may not attend the presuit mediation conference without the consent of all parties, except for counsel for the parties and a corporate representative designated by the association. When mediation is attended by a quorum of the board, such mediation is not a board meeting for purposes of notice and participation set forth in s. 720.303. An aggrieved party shall serve on the responding party a written demand to participate in presuit mediation in substantially the following form:

STATUTORY OFFER TO PARTICIPATE IN PRESUIT MEDIATION

The alleged aggrieved party, _____, hereby demands that _____, as the responding party, engage in mandatory presuit mediation in connection with the following disputes, which by statute are of a type that are subject to presuit mediation:

(List specific nature of the dispute or disputes to be mediated and the authority supporting a finding of a violation as to each dispute.)

Pursuant to section 720.311, Florida Statutes, this demand to resolve the dispute through presuit mediation is required before a lawsuit can be filed concerning the dispute. Pursuant to the statute, the parties are required to engage in presuit mediation with a neutral third-party mediator in order to attempt to resolve this dispute without court action, and the aggrieved party demands that you likewise agree to this process. If you fail to participate in the mediation process, suit may be brought against you without further warning.

The process of mediation involves a supervised negotiation process in which a trained, neutral third-party mediator meets with both parties and assists them in exploring possible opportunities for resolving part or all of the dispute. By agreeing to participate in presuit mediation, you are not bound in any way to change your position. Furthermore, the mediator has no authority to make any decisions in this matter or to determine who is right or wrong and merely acts as a facilitator to ensure that each party understands the position of the other

party and that all options for reasonable settlement are fully explored.

If an agreement is reached, it shall be reduced to writing and becomes a binding and enforceable commitment of the parties. A resolution of one or more disputes in this fashion avoids the need to litigate these issues in court. The failure to reach an agreement, or the failure of a party to participate in the process, results in the mediator declaring an impasse in the mediation, after which the aggrieved party may proceed to court on all outstanding, unsettled disputes. If you have failed or refused to participate in the entire mediation process, you will not be entitled to recover attorney's fees, even if you prevail.

The aggrieved party has selected and hereby lists five certified mediators who we believe to be neutral and qualified to mediate the dispute. You have the right to select any one of these mediators. The fact that one party may be familiar with one or more of the listed mediators does not mean that the mediator cannot act as a neutral and impartial facilitator. Any mediator who cannot act in this capacity is required ethically to decline to accept engagement. The mediators that we suggest, and their current hourly rates, are as follows:

(List the names, addresses, telephone numbers, and hourly rates of the mediators. Other pertinent information about the background of the mediators may be included as an attachment.)

You may contact the offices of these mediators to confirm that the listed mediators will be neutral and will not show any

favoritism toward either party. The Florida Supreme Court can provide you a list of certified mediators.

Unless otherwise agreed by the parties, section 720.311(2)(b), Florida Statutes, requires that the parties share the costs of presuit mediation equally, including the fee charged by the mediator. An average mediation may require three to four hours of the mediator's time, including some preparation time, and the parties would need to share equally the mediator's fees as well as their own attorney's fees if they choose to employ an attorney in connection with the mediation. However, use of an attorney is not required and is at the option of each party. The mediators may require the advance payment of some or all of the anticipated fees. The aggrieved party hereby agrees to pay or prepay one-half of the mediator's estimated fees and to forward this amount or such other reasonable advance deposits as the mediator requires for this purpose. Any funds deposited will be returned to you if these are in excess of your share of the fees incurred.

To begin your participation in presuit mediation to try to resolve the dispute and avoid further legal action, please sign below and clearly indicate which mediator is acceptable to you. We will then ask the mediator to schedule a mutually convenient time and place for the mediation conference to be held. The mediation conference must be held within ninety (90) days of this date, unless extended by mutual written agreement. In the event that you fail to respond within 20 days from the date of this letter, or if you fail to agree to at least one of the mediators that we have suggested or to pay or prepay to the mediator one-half of the costs involved, the aggrieved party

will be authorized to proceed with the filing of a lawsuit against you without further notice and may seek an award of attorney's fees or costs incurred in attempting to obtain mediation.

Therefore, please give this matter your immediate attention. By law, your response must be mailed by certified mail, return receipt requested, and by first-class mail to the address shown on this demand.

_____

_____

RESPONDING PARTY: YOUR SIGNATURE INDICATES YOUR AGREEMENT TO THAT CHOICE.

AGREEMENT TO MEDIATE

The undersigned hereby agrees to participate in presuit mediation and agrees to attend a mediation conducted by the following mediator or mediators who are listed above as someone who would be acceptable to mediate this dispute:

(List acceptable mediator or mediators.)

I/we further agree to pay or prepay one-half of the mediator's fees and to forward such advance deposits as the mediator may require for this purpose.

_____

Signature of responding party #1

_____

Telephone contact information

_____

Signature and telephone contact information of responding party #2 (if applicable)(if property is owned by more than one person, all owners must sign)

(b) Service of the statutory demand to participate in presuit mediation shall be effected by sending a letter in substantial conformity with the above form by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail, to the address of the responding party as it last appears on the books and records of the association. The responding party has 20 days from the date of the mailing of the statutory demand to serve a response to the aggrieved party in writing. The response shall be served by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail, to the address shown on the statutory demand. Notwithstanding the foregoing, once the parties have agreed on a mediator, the mediator may reschedule the mediation for a date and time mutually convenient to the parties. ~~The department shall conduct the proceedings through the use of department mediators or refer the disputes to private mediators who have been duly certified by the department as provided in paragraph (c).~~ The parties shall share the costs of presuit mediation equally, including the fee charged by the mediator, if any, unless the parties agree otherwise, and the mediator may require advance payment of its reasonable fees and costs. The failure of any party to respond to a demand or response, to agree upon a mediator, to make payment of fees and costs within

the time established by the mediator, or to appear for a scheduled mediation session without the approval of the mediator, shall constitute the failure or refusal to participate in the mediation process and shall operate as an impasse in the presuit mediation by such party, entitling the other party to proceed in court and to seek an award of the costs and fees associated with the mediation. Additionally, notwithstanding the provisions of any other law or document, persons who fail or refuse to participate in the entire mediation process may not recover attorney's fees and costs in subsequent litigation relating to the dispute. If any presuit mediation session cannot be scheduled and conducted within 90 days after the offer to participate in mediation was filed, an impasse shall be deemed to have occurred unless both parties agree to extend this deadline. ~~If a department mediator is used, the department may charge such fee as is necessary to pay expenses of the mediation, including, but not limited to, the salary and benefits of the mediator and any travel expenses incurred. The petitioner shall initially file with the department upon filing the disputes, a filing fee of $200, which shall be used to defray the costs of the mediation. At the conclusion of the mediation, the department shall charge to the parties, to be shared equally unless otherwise agreed by the parties, such further fees as are necessary to fully reimburse the department for all expenses incurred in the mediation.~~

(c) ~~(b)~~ If presuit mediation as described in paragraph (a) is not successful in resolving all issues between the parties, the parties may file the unresolved dispute in a court of competent jurisdiction or elect to enter into binding or nonbinding arbitration pursuant to the procedures set forth in s. 718.1255 and rules adopted by the division, with the

arbitration proceeding to be conducted by a department arbitrator or by a private arbitrator certified by the department. If all parties do not agree to arbitration proceedings following an unsuccessful presuit mediation, any party may file the dispute in court. A final order resulting from nonbinding arbitration is final and enforceable in the courts if a complaint for trial de novo is not filed in a court of competent jurisdiction within 30 days after entry of the order. As to any issue or dispute that is not resolved at presuit mediation, and as to any issue that is settled at presuit mediation but is thereafter subject to an action seeking enforcement of the mediation settlement, the prevailing party in any subsequent arbitration or litigation proceeding shall be entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process.

(d) ~~(c) The department shall develop a certification and training program for private mediators and private arbitrators which shall emphasize experience and expertise in the area of the operation of community associations.~~ A mediator or arbitrator shall be ~~certified~~ authorized to conduct mediation or arbitration under this section ~~by the department~~ only if he or she has been certified as a circuit court civil mediator or arbitrator, respectively, pursuant to the requirements established ~~attended at least 20 hours of training in mediation or arbitration, as appropriate, and only if the applicant has mediated or arbitrated at least 10 disputes involving community associations within 5 years prior to the date of the application, or has mediated or arbitrated 10 disputes in any area within 5 years prior to the date of application and has completed 20 hours of training in community association disputes. In order to be certified by the department, any~~

~~mediator must also be certified~~ by the Florida Supreme Court. Settlement agreements resulting from mediation shall not have precedential value in proceedings involving parties other than those participating in the mediation to support either a claim or defense in other disputes. ~~The department may conduct the training and certification program within the department or may contract with an outside vendor to perform the training or certification. The expenses of operating the training and certification and training program shall be paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes referred to in this subsection and by the training fees.~~

(e) ~~(d)~~ The presuit mediation procedures provided by this subsection may be used by a Florida corporation responsible for the operation of a community in which the voting members are parcel owners or their representatives, in which membership in the corporation is not a mandatory condition of parcel ownership, or which is not authorized to impose an assessment that may become a lien on the parcel.

~~(3) The department shall develop an education program to assist homeowners, associations, board members, and managers in understanding and increasing awareness of the operation of homeowners' associations pursuant to this chapter and in understanding the use of alternative dispute resolution techniques in resolving disputes between parcel owners and associations or between owners. Such education program may include the development of pamphlets and other written instructional guides, the holding of classes and meetings by department employees or outside vendors, as the department determines, and the creation and maintenance of a website containing instructional materials. The expenses of operating~~

~~the education program shall be initially paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes referred to in this subsection.~~

Section 17. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2007.

========== T I T L E A M E N D M E N T ==========

Remove the entire title and insert:

A bill to be entitled

An act relating to community associations; creating s. 712.11, F.S.; providing for the revival of certain covenants that have lapsed; amending s. 718.106, F.S.; prohibiting local governments from limiting the access of certain persons to beaches adjacent to or adjoining condominium property; amending s. 718.110, F.S.; revising provisions relating to the amendment of declarations; providing legislative findings and a finding of compelling state interest; providing criteria for consent to an amendment; requiring notice regarding proposed amendments to mortgagees; providing criteria for notification; providing for voiding certain amendments; amending s. 718.114, F.S.; providing that certain leaseholds, memberships, or other possessory or use interests shall be considered a material alteration or substantial addition to certain real property; amending s. 718.404, F.S.; providing retroactive application of provisions relating to mixed-use condominiums; amending s. 719.103, F.S.; providing a definition; amending s. 719.507, F.S.; prohibiting laws, ordinances, or regulations that apply only to improvements that are or may be subjected to an equity club form of ownership; amending s. 720.302, F.S.; revising governing provisions relating to corporations that operate residential

homeowners' associations; amending s. 720.303, F.S.; revising application to include certain meetings; requiring the association to provide certain information to prospective purchasers or lienholders; authorizing the association to charge a reasonable fee for providing certain information; requiring the budget to provide for annual operating expenses; authorizing the budget to include reserve accounts for capital expenditures and deferred maintenance; providing a formula for calculating the amount to be reserved; authorizing the association to adjust replacement reserve assessments annually; authorizing the developer to vote to waive the reserves or reduce the funding of reserves for a certain period; revising provisions relating to financial reporting; revising time periods in which the association must complete its reporting; repealing s. 720.303(2), F.S., as amended, relating to board meetings, to remove conflicting versions of that subsection; creating s. 720.3035, F.S.; providing for architectural control covenants and parcel owner improvements; authorizing the review and approval of plans and specifications; providing limitations; providing rights and privileges for parcel owners as set forth in the declaration of covenants; amending s. 720.305, F.S.; providing that, where a member is entitled to collect attorney's fees against the association, the member may also recover additional amounts as determined by the court; amending s. 720.306, F.S.; providing that certain mergers or consolidations of an association shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel; amending s. 720.307, F.S.; requiring developers to deliver financial records to the board in any transition of association control to members; requiring certain information to be included in the records and for the records to be prepared in

a specified manner; amending s. 720.308, F.S.; providing circumstances under which a guarantee of common expenses shall be effective; providing for approval of the guarantee by association members; providing for a guarantee period and extension thereof; requiring the stated dollar amount of the guarantee to be an exact dollar amount for each parcel identified in the declaration; providing payments required from the guarantor to be determined in a certain manner; providing a formula to determine the guarantor's total financial obligation to the association; providing that certain expenses incurred in the production of certain revenues shall not be included in the operating expenses; amending s. 720.311, F.S.; revising provisions relating to dispute resolution; providing that the filing of any petition for arbitration or the serving of an offer for presuit mediation shall toll the applicable statute of limitations; providing that certain disputes between an association and a parcel owner shall be subject to presuit mediation; revising provisions to conform; providing that temporary injunctive relief may be sought in certain disputes subject to presuit mediation; authorizing the court to refer the parties to mediation under certain circumstances; requiring the aggrieved party to serve on the responding party a written offer to participate in presuit mediation; providing a form for such offer; providing that service of the offer is effected by the sending of such an offer in a certain manner; providing that the prevailing party in any subsequent arbitration or litigation proceedings is entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process; requiring the mediator or arbitrator to meet certain certification requirements; removing a requirement relating to development of an education program to increase awareness of the

operation of homeowners' associations and the use of alternative dispute resolution techniques; providing effective dates.